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Assessment of Damages in Personal Injury Actions

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ASSESSMENT OF DAMAGES IN PERSONAL INJURY ACTIONS†

BY VERNON X. MILLER*

IN the world of today bodily injuries to human beings are frequent and serious. The injured person must inevitably bear a part, if not all, of the risk of loss. If the hurt has been caused by the wrongful act of another the person injured may have his action at law. Workmen's compensation acts have taken certain of these cases outside the province of the orthodox courts. Many persons in the community are insured against liability growing out of their own wrongful acts. Others voluntarily insure against accidental injury to their persons. Numerous cases which would otherwise reach the courts are settled between the parties. Nevertheless, in spite of these factors, litigation in personal injury cases consumes a large part of the energies of the judicial process.

For the purpose of this paper it will be assumed that the plaintiff has a cause of action, i.e., his right to personal security, to bodily integrity, has been invaded by the defendant's wrongful act, negligent or otherwise. That being true, the plaintiff is entitled to damages. The problem to be investigated is how the damages are to be assessed. The question of punitive or exemplary damages, where the defendant's act has been intentional or grossly negligent, will not be discussed.

I. THE DATA FOR EVALUATING THE HURT

The burden is upon the plaintiff to show the extent of his hurt. If his arm or his leg has been amputated the task is simple. He can present his person in court. If it is a question of impaired mental faculties, ill health due to the injury, and especially some nervous disorder, his problem of proof is more difficult.[1] Expert

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[1]For example see the following cases: Mortrude v. Martin, (1919) 185 Iowa 1319, 172 N. W. 17, impaired mental faculties as a result of a fracture of the skull and internal hemorrhages; Stroup v. Northeast Oklahoma R. Co., (1927) 122 Kan. 587, 253 Pac. 242, 254 Pac. 396, nervous shock and mental derangement; Gregory v. Perry, (1927) 126

testimony will be required in all but the clearest cases. The plaintiff must establish with sufficient evidence the extent of his hurt as he alleges it to be, and that the same has been brought about by the defendant's wrongful act.[2]

The problem of assessing damages is the problem of evaluating the hurt or injury which the plaintiff has demonstrated. The data which the plaintiff may introduce to aid the jury in the process of evaluating the hurt are such as these: the value of the time he has lost by reason of the injury, the expenses he has been put to in effecting a cure, the physical disability he has

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Me. 99, 136 Atl. 354, nervous shock; Kloss v. Minneapolis St. Ry. Co., (1928) 174 Minn. 294, 219 N. W. 179, anemic and neurasthenic condition caused by a miscarriage; Boyer v. Missouri Pac. Ry. Co. (Mo. 1927) 293 S. W. 386, nervous shock and heart trouble; Unterlachner v. Wells, (1927) 317 Mo. 181, 296 S. W. 755, dizzy spells; Boyle v. Phila. R. T. Co. (1926) 286 Pa. St. 536, 134 Atl. 446, psychoneurosis; McEachran v. Rothschild & Company, (1925) 135 Wash. 260, 237 Pac. 711, heart trouble; Webb v. Chesapeake & O. Ry. Co., (1928) 105 W. Va. 555, 144 S. E. 100, general debility. Cf. Levan v. Chicago Rock Island & Pac. Ry. Co., (1924) 158 Minn. 69, 196 N. W. 673, where the only symptoms exhibited by the plaintiff were "muscular rigidity," "loss of weight" and a "haggard look." The court said that no considerable verdict should stand unless there was substantial evidence apart from the plaintiff's description of his symptoms. A verdict for $2,750 was reduced to $1,750 by order of the appellate court.

[2]In Brannan v. Chicago & N. W. Ry. (Neb. 1929) 223 N. W. 21, the plaintiff had been bitten by a non-poisonous snake while he was working in the company's roundhouse. Shortly thereafter the plaintiff's physical condition became perilous. It was a question whether the poison in his system had been produced by infection following the snake's bite or from other organic conditions in the plaintiff's body. The court was satisfied that the evidence was enough to show that the plaintiff's condition had been caused by infection following the snake's bite. A judgment for the plaintiff was affirmed on condition that he accept $28,000. Where the plaintiff is suffering from paralysis he must show that the condition is due to the alleged injury and not to other causes. See Sullivan v. Minn., St. P. & S. Ste. M. R. Co., (1927) 55 N. D. 353, 213 N. W. 841. In Gerber v. Wloszczynski, (1925) 188 Wis. 344, 206 N. W. 206, it was claimed that an injury to a child of six had caused the child's heart to be enlarged. A judgment in favor of the child was reversed because the evidence did not show that the condition had been caused by the injury complained of. Cf. McCrosson v. Phila. R. T. Co., (1925) 283 Pa. St. 492, 129 Atl. 568. In that case it was alleged that as a result of her injury the plaintiff's system had been weakened so that she had contracted pneumonia. The evidence was sufficient to show it, but the court said that the expenses of the later illness were not within the scope of the defendant's liability for the act which had caused the original injury to the plaintiff. In Reinert v. Atlantic City R. Co., (1927) 5 N. J. Misc. 399, 136, Atl. 300 the plaintiff claimed to have developed varicose veins in his legs as a result of his injury. Because the court was not satisfied that the evidence showed that his condition was due to the alleged injury, it affirmed judgment in the plaintiff's favor on condition that he accept $10,000 instead of $20,000, the amount of the verdict.

suffered, either temporary or permanent, the impairment of his earning capacity, the inconvenience and humiliation he may have undergone, and will continue to undergo, as a result of the hurt. Any one or more of these will normally be considered in evaluating the injury.

The dominant idea with which the courts express their objective is compensation to the plaintiff for his hurt.[3] But the courts talk of the problem as if the plaintiff is entitled to a money equivalent corresponding to the items listed above.[4] This elliptical method of exposition is often misleading; these several data are not the hurt itself but are the items by which the hurt is measured. Indeed, the same kinds of data may be material items in the evaluation of different injuries. A parent may seek to recover the expenses incurred in behalf of his injured child, and he may seek compensation for the loss of the child's services.[5] A hus-

[3]See Dierks Lumber & Coal Co. v. Tollett, (1928) 178 Ark. 199, 204, 10 S. W. (2d) 5, 7; Atlantic Coast Line R. Co. v. Anderson, (1926) 35 Ga. App. 292, 297, 133 S. E. 63, 65; Louisville & N. Ry. Co. v. Minnix, (1924) 202 Ky. 472, 475, 260 S. W. 15, 16.

[4]See Palmer Hotel Co. v. Renfro, (1917) 173 Ky. 447, 448, 191 S. W. 271, 272, "The jury was directed that if the injuries received by appellee were permanent, it should find for him such a sum as would fairly and reasonably compensate him for pain and suffering, mental and physical, which he has endured by reason of the injuries, and which it appeared, from the evidence, that he would thereafter endure, and for the permanent impairment of his power to earn money together with any reasonable expense incurred by him for medical services . . ." See Snyder v. Reading Co., (1925) 284 Pa. St. 59, 61, 130 Atl. 398, "On the question of damages the trial judge charged the jury in part and in effect that if they found for plaintiff he should be fairly and fully compensated for the injuries sustained, including immediate loss of earnings, the expense necessarily resulting from the injuries, and damages for the pain and suffering directly caused thereby, and also for the impairment of his earning power, if they found the injuries permanent." See also the instructions of the trial courts as quoted in the following cases: Mercado v. Nelson, (1925) 118 Kan. 302, 235 Pac. 123; King v. Missouri Pac. R. Co., (Mo. 1924) 263 S. W. 828, Muskogee Electric Traction Co. v. Wimmer, (1920) 80 Okla. 11, 194 Pac. 107; Riddel v. Lyon, (1923) 124 Wash. 146, 213 Pac. 487, 37 A. L. R. 486.

[5]That the parent's separate cause of action is generally conceded, see Dziak v. Swaney, (1927) 289 Pa. St. 246, 137 Atl. 228. The parent can recover compensation for loss of services which he would be entitled to receive until the child reached its majority. See Pawnee Co. v. Powell, (1924) 76 Colo. 1, 277 Pac. 836, 37 A. L. R. 6; Weaver v. Wheeling Traction Co., (1922) 91 W. Va. 528, 114 S. E. 131. Where the child is young, and there is no pecuniary measure of its earning capacity, there is a difference of opinion as to whether the parent can recover anything at all for future loss of services. The Rhode Island Court has said that in such a case the parent can recover only for expenses, because the loss of services is too problematical. Sroka v. Halliday, (1920) 43 R. I. 75, 110 Atl. 375. The more general rule would seem to be that the jury can, even in these cases, make an

band may sue for loss of consortium.[6] In these cases the jury is not evaluating a physical hurt which the parent or husband has received. Nor are the jury evaluating the hurt to the wife or child in assessing damages in the husband's or parent's action. The cause of action in the particular case is based upon an injury sustained because of the relationship the plaintiff bears toward the person who has received the physical hurt. The wife or child may have a separate cause of action. When such data as loss of time and expense are considered in the parent's or husband's action, they cannot be used to evaluate the injured person's physical hurt.[7]

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estimate of what the child's earning capacity would be during his minority as based upon the parents' station in life and the opportunities which the child would normally enjoy. Garrison v. Pearlstein, (1924) 68 Cal. App. 334, 229 Pac. 351; Jackiewicz v. United Illuminating Co., (1927) 106 Conn. 310, 138 Atl. 151; Pratt v. Detroit Taxicab and Transfer Co., (1923) 225 Mich. 147, 195 N. W. 691.

[6]A husband may recover certainly for the expenses that he has incurred because of his wife's illness, and he is entitled to compensation for the injuries he has sustained because he has been deprived of her services, past or future. Alabama Power Co. v. Goodwin, (1923) 210 Ala. 388, 98 So. 124; Kelley v. Thibodeau, (1921) 120 Me. 402, 115 Atl. 162; Goar v. Village of Stephen, (1925) 162 Minn., 464, 203 N. W. 62. In these cases the wife's services were performed in the home. Loss of consortium, which the husband may claim to have suffered, includes more than merely loss of services. See Robenson v. Turner, (1925) 206 Ky. 742, 268 S. W. 341, where the court pointed out that the wife would no longer be able to accompany her husband, nor to contribute to his comfort and pleasure as she would have been able to do were it not for the injuries. In Golden v. R. L. Greene Paper Co., (1922) 44 R. I. 231, 116 Atl. 579, 21 A. L. R. 1514, it was said that the jury ought not to be allowed to consider that the wife's capacity for sexual intercourse had been impaired.

[7]See Shipp v. Stage Lines, (1926) 192 N. C. 475, 135 S. E. 339, where a judgment in favor of a minor plaintiff was reversed because the trial judge had failed to tell the jury that the plaintiff was entitled to compensation only for the impairment of his power to earn money after reaching his majority. See also McCallam v. Gas. Co., (1923) 93 W. Va. 426, 117 S. E. 148, in which the plaintiff, through her next friend was ordered to remit $500 from the damages, because that sum represented the claim for medical expenses which were for her parent to recover. See also Kepler v. Chicago, St. P., M. & O. Ry., (1923) 111 Neb. 273, 196 N. W. 161, where the plaintiff was ordered to remit $2,525 from the judgment as representing the amount allowed for expenses which had been properly incurred by her husband. In Central of Georgia R. Co. v. Morgan, (1916) 145 Ga. 656, 89 S. E. 760, it was held that impairment of a wife's earning capacity is a special loss recoverable by the husband, and a judgment in favor of the wife was reversed where that item had been presented to the jury. In Terre Haute, etc., Traction Co. v. Phillips, (1921) 191 Ind. 374, 132 N. E. 740, it was held that an unemancipated minor is not entitled to recover for loss of wages. Cf. Bong v. Webster, (1927) 217 Ky. 781, 290 S. W. 662, in which the court said that, where the parent brings an action for the minor as the latter's next friend, expenses and loss of time may be competent evidence in that case, and the

If a property interest has been invaded by the defendant's wrongful act, the equivalent in money might readily be determined by evaluating the specific item or items of property injured. The market value, for instance, of the property destroyed would in most cases compensate the loser. But where the injury is a bodily hurt, literal compensation is impossible. There can be no market value for a scarred face, a missing limb, or ill health.[8] Where the plaintiff has suffered a minor injury to his person, it is of little consequence that compensation cannot be accurately computed. Loss of wages and expenses, the usual facts incident to such a case, are fairly definite. The pain and suffering, inconvenience, and temporary disability have been so slight that the amount of money which the plaintiff would get by reason of those facts can be approximated fairly enough. Where the injury is serious and the disability is great, the facts of bodily impairment, impairment of earning capacity, humiliation, and pain and suffering, are the most important data for consideration. The data may be largely subjective. An evaluation based upon them will necessarily be uncertain.

II. The Function of the Trial Judge

It is the function of the trial judge to translate to the jury the problem of evaluating the plaintiff's hurt. To enable the jury to understand their part in the process, he speaks to them in terms of compensation for items of loss. He tells them to compensate the plaintiff for loss of time, pain and suffering, past and future, the expenses incurred because of the injury, impairment of earning capacity, and other losses as they may find present.[9] The jurors set about to take an inventory of these separate losses and to evaluate each. The result in gross is an evaluation of the plain-

parent will then be barred from another suit in his own right. See Ruleson v. Victor X-Ray Corporation, (Iowa 1929) 223 N. W. 775. In Iowa the local statutes purport to place a married woman in the same position as if she were single where the action is for personal injuries. In the particular case the jury were allowed to consider, in assessing damages, the impairment of earning power sustained by the plaintiff, a married woman, who was no longer able to continue in her former employment, and to consider also the fact that the plaintiff had suffered a permanent disability as a wife and mother.

[8]"In one sense of the word there is no such thing as a money equivalent for a broken and crippled body or for physical or mental suffering, but as the nearest practical approach to satisfaction for torts of this nature the law allows the jury in proper cases to assess money damages." Buffalo v. City of Des Moines (1922) 193 Iowa 194, 202, 186 N. W. 844, 848.

[9]See the cases cited in note 4.

tiff's hurt. How does the trial court determine which items of loss the jury can consider? He is limited, first of all, by the evidence and the pleadings, and secondly, by the customary rules for measuring damages.

The specific combination of facts in each case is unique. Assuming that the evidence is enough to establish the hurt, there may be, from the circumstances of the case, little or much data which can be used for evaluating the injury. The items of loss, nevertheless, fall into categories more or less stereotyped. For example, if the plaintiff is a wage earner, and the disability is permanent, loss of wages, impairment of earning capacity, and expenses incurred in effecting a cure, will all normally be shown.[10] Pain and suffering follow as an incident to every physical injury.[11] On the other hand, if the plaintiff follows no regular occupation, or has no capacity to earn money, no loss in wages, nor any impairment of earning capacity can be shown. Yet, he is entitled to damages. The fact of the physical disability itself, together with the resulting inconvenience to the plaintiff, plus pain and suffering, gives a basis for evaluating the hurt.[12]

[10]The following are illustrative cases: Reneau v. Hirsch, (1927) 88 Cal. App. 1, 262 Pac. 1100, the case of a delivery boy; Driscoll v. California St. R. Co., (1926) 80 Cal. App. 208, 250 Pac. 1062, a laborer; Dall v. Bangor Ry. & Elec. Co., (1927) 126 Me. 261, 137 Atl. 773, a typist; Pulliam v. Wheelock, (1928) 319 Mo. 139, 3. S. W. (2d) 374, a locomotive engineer; Schroeder v. Wells, (Mo. 1927) 298 S. W. 806, a carpenter; Fredericks v. Atlantic Refining Co., (1925) 282 Pa. St. 8, 127 Atl. 615, 38 A. L. R. 666, a truckdriver; Jackson v. Mitsui & Co., (1926) 138 Wash. 124, 244 Pac. 385, a stevedore.

[11]Willis v. Schertz, (1920) 188 Iowa 712, 175 N. W. 321; Mayne v. Kansas City Rys. Co., (1921) 287 Mo. 235, 229 S. W. 386; Perry v. Pickwick Stages of Ore., (1926) 117 Or. 598, 243 Pac. 787. Cf. Young v. Mandis, (1921) 191 Iowa 1328, 184 N. W. 302. In that case the plaintiff had asked for $3,000 damages. The trial court had allowed the jury to consider only the actual time lost, stating that the pain and suffering in the evidence had not been pleaded. The judgment for a small amount was affirmed. The court said that the evidence of pain and suffering which the plaintiff had introduced was not within the scope of the injury alleged in the pleadings.

[12]The most common illustration of this kind of case is where the plaintiff is a married woman, or family housekeeper. See Rosander v. Market St. Ry. Co., (1928) 89 Cal. App. 710, 721, 265 Pac. 536, 541; Darling v. Pacific Electric Ry. Co., (1925) 197 Cal. 702, 242 Pac. 703; Glanville v. Chicago, R. I. & P. R. Co., (1923) 196 Iowa 456, 193 N. W. 548; Kepler v. Chicago, St. P., M. & O. Ry. Co., (1923) 111 Neb. 273, 196 N. W. 161; Texas & P. Ry. Co., v. Perkins, (Tex. Civ. App. 1926) 284 S. W. 683. Cf. Rettlia v. Salomon, (1925) 308 Mo. 673, 274 S. W. 366, where the plaintiff was a retired business man. The plaintiff may be a wage earner, and the injury may be permanent, but his earning capacity unimpaired. See Mahoney v. Pearce, (1928) 38 Wyo. 151, 265 Pac. 446, where the plaintiff, a truckdriver, had sustained a broken jaw; also, Curtis v. Public Service Ry.

Expense.—The item of expense is most easily presented to the jury. It may include the following: expenses for medicines, hospital care, the services of physicians, surgeons, nurses and servants. The amounts are usually definite. It is said that the plaintiff can recover only the reasonable value of the expenses.[13] Testimony that he has paid the bills is enough from which the jury can infer the reasonableness of the charges.[14] This item is not present in every case although the plaintiff may have received hospital care or medical attention. The bills may have been assumed by the plaintiff's parents, husband, employer, or even by the defendant before the bringing of the action.[15] If the jury is to consider proof of expense in evaluating the plaintiff's hurt, the item should be specially pleaded.[16]

Pain and Suffering.—There is no formula which the trial judge can use to present the matter of pain and suffering to the

Co., (1927) 5 N. J. Misc. 985, 139 Atl. 241, where the plaintiff, a schoolteacher, had suffered a broken knee joint.

[13]Atchison, etc., Ry. Co., v. Gutierrez, (1926) 30 Ariz. 491, 249 Pac. 66; Miller v. City of Eldon, (1919) 185 Iowa 307, 170 N. W. 377, where the expenses were incurred for the services of a chiropractor; Arnold v. Ft. Dodge, Des Moines & So. R. Co., (1919) 186 Iowa 538, 173 N. W. 252; Alt v. Konkle, (1927) 237 Mich. 264, 211 N. W. 661; Coblentz v. Jaloff, (1925) 115 Or. 656, 239 Pac. 825; cf. Rogers v. Phila. & R. Ry. Co., (1919) 263 Pa. St. 429, 106 Atl. 734, in which the court held that the jury could infer from the proof of what the plaintiff has had to spend in the past for medical attention what he would have to spend in the future.

[14]Dewhirst v. Leopold, (1924) 194 Cal. 424, 229 Pac. 30; Oliver v. Weaver, (1923) 72 Colo. 540, 212 Pac. 978; Dickey v. Jackson, (Tex. Civ. App. 1927) 293 S. W. 584; Barlow v. Salt Lake & Utah R. Co., (1920) 57 Utah 312, 194 Pac. 665. In Oliverius v. Wicks, (1922) 107 Neb. 821, 187 N. W. 73, the court held that oral testimony that the plaintiff had paid the bills was not enough. See Conway v. Robinson, (1927) 216 Ala. 495, 113 So. 531, in which a statement by the plaintiff, that he had paid an attendant the cheapest price he could, was said to be evidence that the charge was reasonable. Cf. the cases cited above in note 13.

[15]See Consolidated Arizona S. Co. v. Egich, (1920) 22 Ariz. 543, 199 Pac. 132, where the plaintiff had been treated in the hospital of the defendant company, the plaintiff's employer; see also, Alexander v. Standard Oil Co. of Louisiana, (1916) 140 La. 54, 72 So. 806, where the company had paid all of the plaintiff's expenses. In Merrill v. St. Paul City Rv. Co., (1927) 170 Minn. 332, 212 N. W. 533, the plaintiff's expenses were paid by a company insurance association established by his employer, who was not the defendant in the case. Cf. also the cases cited in notes 5 and 6.

[16]La Duke v. Dexter, (Mo. App. 1918) 202 S. W. 254; Horton v. Childs Co., (1924) 208 App. Div. 765, 203 N. Y. S. 301. See Braun v. Bell, (1921) 247 Mass. 437, 441, 142 N. E. 93. Cf. Chicago, etc., R. Co. v. Steele, (1918) 187 Ind. 358, 118 N. E. 824, 119 N. E. 483, where the court said, if the injuries are serious, it can be presumed that some medical attention would be necessary and that that fact need not be specially pleaded.

jury.[17] In this discussion it is unnecessary to consider the liability of a defendant for mental shock unattended by any physical injury.[18] Here the plaintiff has sustained the physical hurt, and the mental anguish, physical pain, or humiliation which the injured person has endured, and will have to suffer in the future, are all facts which the jury may consider in the process of evaluating the hurt. Obviously there can be no definite pecuniary measure for mental anguish or physical pain.[19] Obviously, too, a certain amount of pain and suffering will follow normally every physical injury, and this the plaintiff should not have to plead specially.[20]

There is some difference of opinion as to what kind of pain and suffering can be considered by a jury in evaluating a physical injury. Mental anguish, worry, fear, or humiliation may be considered as "too remote" from the injury to be taken into account.[21]

[17]In Michigan it seems to be the rule that the trial court should instruct the jury to compute the compensation allowed for future pain and suffering at its present worth. Brandt v. C. F. Smith Co., (1928) 242 Mich. 217, 218 N. W. 803; Sweeney v. Moreland Bros. Co., (1924) 227 Mich. 203, 198 N. W. 932. The North Carolina court has stated the same rule. See Shipp v. Stage Lines, (1926) 192 N. C. 475, 135 S. E. 339. More often it is said to be unnecessary, but not erroneous when the defendant is the appellant, to instruct the jury to reduce the allowance for future pain and suffering to its present worth. Chicago & N. W. Ry. Co. v. Candler, (C. C. A., 8th cir. 1922) 283 Fed. 881; Louisville & N. R. Co. v. Gayle, (1924) 204 Ky. 142, 263 S. W. 763; Rigley v. Pryor, (1921) 290 Mo. 10, 233 S. W. 828; Le Van v. McLean, (1923) 276 Pa. St. 361, 120 Atl. 395.

[18]See the article by Professor Herbert F. Goodrich, Emotional Disturbance as Legal Damage, (1922) 20 Mich. L. Rev. 497.

[19]See Fredericks v. Atlantic Ref. Co., (1925) 282 Pa. St. 8, 20, 127 Atl. 615, 38 A. L. R. 666, where the court said, " . . . there is a zone of uncertainty as to . . . compensation for pain and suffering, which is exclusively within the jury's province to determine;" Whitman's, etc., Garage Co. v. Richs, (1924) 211 Ala. 527, 529, 101 So. 53, "Damages for physical pain and mental anguish are in a large measure descretionary . . . ;" Chesapeake & O. Ry. v. Arrington, (1919) 126 Va. 194, 217, 101 S. E. 415, "The law wisely leaves the assessment of damages, as a rule to jurors, with the concession that there are no scales in which to weigh human suffering . . ."

[20]See the cases cited in note 11.

[21]In Lake Erie, etc., R. Co. v. Johnson, (1921) 191 Ind. 479, 133 N. E. 732, it was held to have been error on the part of the trial judge to instruct on mental anguish caused by the plaintiff's apprehension of a fatal termination of his injuries. In Bonelli v. Branciere, (1921) 127 Miss. 556, 90 So. 245, where the plaintiff had been disfigured by the injury, the court held that a jury could not allow a plaintiff damages for endless humiliation. In another Mississippi case, Newman Lumber Co. v. Norris, (1922) 130 Miss 751, 94 So. 881, the court said that only when the disfigurement is accompanied by physical suffering should it be considered by the jury. Cf Rostad v. Portland, etc., Co., (1921) 101 Or. 569, 201 Pac. 184, where the court said that the jury could not consider mere mental anguish to the plaintiff caused by her brooding over her injuries. In the particular case it was held that the instructions on pain and suffering had not been too broad

Most often, any one of these facts can be called to the jury's attention.[22] Particularly, if the injury has resulted in the plaintiff's disfigurement, the resulting humiliation which the plaintiff will experience is almost universally considered as competent evidence to be used in the process of evaluating the injury.[23]

Loss of Time and Impairment of Earning Capacity.—Loss of time and impairment of earning capacity should be considered together. The one item presents the matter of the plaintiff's loss of earnings up to the time of the trial, the other, his loss of earnings in the future. Every person has a potential earning capacity. If he is not exercising that power at the time of the injury his loss of time has resulted in no special pecuniary damage. But being a potential earner, a problematical future loss can be anticipated. It is argued, however, that for both items there must be sufficient evidence of a pecuniary kind to enable the jury to measure the special loss.[24] With respect to each item that contention is subject to some qualification. In both cases the loss should be specially pleaded.[25]

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[22]Lewis v. Springfield, (1927) 261 Mass. 183, 158 N. E. 656, mental fear of meeting with another accident where the plaintiff was already blind; Mayne v. Kansas City Rys. Co., (1921) 287 Mo. 235, 229 S. W. 386, mental suffering because of plaintiff's inability to bear children; Muskogee Elec. Traction Co. v. Wimmer, (1920) 80 Okla. 11, 194 Pac. 107, mental anguish caused by plaintiff's becoming an object of curiosity and ridicule to his fellows; Halloran v. New England Tel. & Tel. Co., (1921) 95 Vt. 273, 115 Atl. 143, 18 A. L. R. 554, mental anguish as a result of a weakened heart.

One cannot generalize to say that any one court will allow any kind of mental anguish, apart from physical pain, to be considered by the jury. On occasion, a particular kind of worry, fear, or sensitiveness, may be considered as too unusual to be regarded in the process of evaluating the particular physical hurt. There can be no general rule. Ordinarily it would seem that whether or not the jury has considered any particular fact of this kind, the final result will be but slightly affected.

[23]Collinson v. Cutler, (1919) 186 Iowa 276, 170 N. W. 420. Penley v. Teague & Harlow Co., (Me. 1928) 140 Atl. 374; McWhirt v. Chicago & A. Ry. Co., (Mo. 1916) 187 S. W. 830; Paquin v. Castles Ice Cream Co., (1926) 5 N. J. Misc. 63, 135 Atl. 460; Crystal Palace Co. v. Nelson, (Tex. Civ. App. 1927) 300 S. W. 183; Dickey v. Jackson, (Tex. Civ. App. 1927) 293 S. W. 584; Sherrill v. Olympic Ice Cream Co., (1925) 135 Wash. 99, 237 Pac. 14; Krutza v. Milwaukee Billiard & Bowling Club, (1928) 195 Wis. 7, 216 N. W. 491.

[24]See Hale v. Atkins, (1923) 215 Mo. App. 380, 256 S. W. 544.

[25]On loss of time: Tucker v. Palmberg, (1916) 28 Idaho 693, 155 Pac. 981; Augustus v. Goodrum, (1928) 224 Ky. 558, 6 S. W. (2d) 703; Louisville & N. R. Co. v. Deering, (1920) 188 Ky. 708, 223 S. W. 1095; Moses v. Klusmeyer, (1916) 194 Mo. App. 634, 186 S. W. 958; Horton v. Childs Co., (1924) 208 App. Div. 765, 203 N. Y. S. 301. On impairment of earning capacity: Brucker v. Gambaro, (Mo. 1928) 9 S. W. (2d) 918; Barlow v. Salt Lake & Utah R. Co., (1920) 57 Utah 312, 194 Pac. 665.

Loss of time can be dismissed with these observations. Where the injured person had been earning a definite wage up to the time of the injury, the pecuniary evidence which can go to the jury is definite.[26] Where the plaintiff's earning career has been temporarily interrupted, but where he had been earning no prescribed wage, the problem of measuring the pecuniary loss is like that to be considered in measuring impairment of earning capacity.[27] Where the plaintiff has suffered no special loss by reason of his temporary incapacity, the fact of disability, though temporary, is evidence of the scope of the hurt, but is not presented to the jury as a separate item.[28]

Future impairment of earning capacity may be permanent, it may be temporary, or it may last indefinitely. It may be total or partial. The jury must determine from all the evidence how extensively the injury has affected the plaintiff's earning capacity. That a crushed hand will affect the earning capacity of a plumber more seriously than it would affect the capacity of a clergyman or a college professor, is an important fact to consider.[29] It is material also to know that even though the plaintiff may have suffered a permanent injury he can still earn as much after the injury as he could before, although perhaps in another kind of occupation.[30] When the plaintiff has been earning a prescribed

[26]See the cases cited in note 10. Cf. Holmes v. California Crushed Fruit Co., (1924) 69 Cal. App. 779, 232 Pac. 178, where the plaintiff had been working on part time. Loss of time was separately considered. The court said that the full time wage scale could be taken into account in calculating the allowance for loss of time.

[27]In Gray v. Boston Elevated Railway Co., (1913) 215 Mass. 143, 102 N. E. 71, the plaintiff was a college professor who was incapacitated by his injuries during the summer months. He was allowed to show that he was thereby unable to write certain articles for publication which he was under contract to turn out. In Mahoney v. Pearce, (1928) 38 Wyo. 151, 265 Pac. 446, the plaintiff was a truck driver. He was incapacitated during the summer months. He was allowed to show that his business was seasonal and that he would have earned more in the summer than he had been earning just before the accident.

[28]See the cases cited in note 12.

[29]Cf. the following cases: Fischer v. C. H. Winans Co., (1928) 6 N. J. Misc. 290, 140 Atl. 889, where the plaintiff was a plumber; Curtis v. Public Service Ry. Co., (1927) 5 N. J. Misc. 984, 139 Atl. 241, where the plaintiff was a school teacher; Melish v. New York Consol. Ry. Co., (1919) 108 Misc. 291, 178 N. Y. S. 228, where the plaintiff was a clergyman.

[30]It has been held that evidence that the plaintiff can earn as much after the injury as he could earn before, on the same or another job, should be considered by the jury, but that it is not conclusive as showing that the plaintiff has suffered no impairment of earning capacity. Norris v. Elmdale Elevator Co., (1921) 216 Mich. 548, 185 N. W. 696; Yeager v. Anthracite Brewing Co., (1917) 259 Pa. St. 123, 102 Atl. 418; Young

wage, the trial judge risks a reversal if in his instructions he paraphrases impairment of earning capacity into future loss of wages or impairment of the capacity to work and labor.[31]

When the plaintiff has been earning a regular wage the jury has a definite sum with which to begin its calculations. But the injured person may have been unemployed at the time of the mishap. Or he may have been employed temporarily at another than his regular occupation. In both cases the wages he should earn at his usual occupation, and his capacity to continue in the occupation, should be considered.[32] An infant of tender years has no earning capacity. Nevertheless, an instruction on impairment of earning capacity is generally allowed in the case of an infant although there is no pecuniary evidence of the impairment.[33]

There is still the case of the professional man, the trader, the small business man. Each one may suffer an impairment of earning capacity. How can it be measured?

It is generally said that a plaintiff who has suffered a physical hurt should not recover for the loss of social or business opportunities, nor for loss of profits.[34] To characterize this kind of

v. Pooley Furniture Co., (1924) 83 Pa. Super Ct. 434, where the plaintiff was a minor who had been working at a casual occupation. Cf. Coca-Cola Bottling Co. v. Shipp, (1928) 177 Ark. 757, 9 S. W. (2d) 8 and Crews v. Schmuke Hauling and Storage Co., (Mo. 1928) 8 S. W. (2d) 624. In each of the latter cases the appellate court ordered the judgment to be reduced because it appeared that the plaintiff, although suffering from permanent injuries, was earning as much after the accident as before. In neither case was it said, however, that it was improper for the jury to have considered the matter of the plaintiff's impairment of earning capacity.

[31]South Covington & C. St. Ry. Co. v. Vanice, (1925) 211 Ky. 774, 287 S. W. 116; McCaffrey v. Schwartz, (1926) 285 Pa. St. 561, 132 Atl. 810.

[32]Galveston, H. & S. A. Ry. Co. v. Contois, (Tex. Civ. App. 1925) 279 S. W. 929; Dowd v Morris, (1925) 133 Wash. 215, 233 Pac. 320. Cf. Kleine v. Pittsburgh Rys., (1915) 252 Pa. St. 214, 97 Atl. 395 and Dallas Ry. Co. v. Hallam, (Tex. Civ. App. 1925) 276 S. W. 460. In each case the plaintiff was a charwoman, who had been earning extra money doing intermittent work, and who was allowed to show what her earnings had been to enable the jury to measure her loss of earning capacity.

[33]Detroit Taxi. & Transfer Co., v. Pratt, (C.C.A. 6th Cir. 1924) 2 F. (2d) 193; Sadlowski v. Meeron, (1927) 240 Mich. 306, 215 N. W. 422; O'Hanlon v. Pittsburg St. Ry. Co., (1917) 256 Pa. St. 394, 100 Atl. 972. In evaluating the child's hurt the point is made in some cases that the jury should consider only the impairment of the plaintiff's capacity after he becomes of age. Shipp v. Stage Lines, (1926) 192 N. C. 475, 135 S. E. 339. See also the cases cited in note 5 above. Cf. Riddel v. Lyon, (1923) 124 Wash. 146, 213 Pac. 487, 37 A. L. R. 486, in which the plaintiff was an aged man. An instruction on impairment of earning power was upheld.

[34]In De Liere v. Goldberg, Bowen & Co., (1916) 30 Cal. App. 612, 159 Pac. 197, the plaintiff had entered into a contract for the purchase of land. By reason of her disability she was unable to pay the remainder of the purchase price, and she had to forfeit what she had already paid down

evidence merely as too remote, too uncertain, or too speculative is evasive. The court must decide whether the particular data can be used to evaluate the plaintiff's physical injury. There is normally other evidence more apt for that purpose. Moreover, data of this sort are usually associated with injuries other than physical hurts to persons. The interest involved may be a property interest or one based upon a relationship of the plaintiff with other persons.[35] In such cases the materiality of such facts as loss of

The court held that this testimony was not competent as evidence of damage in the action for personal injuries. In Hale v. Atkins, (1923) 215 Mo. App. 380, 256 S. W. 544, the plaintiff testified that during the time he had been disabled he was supposed to have cared for another person's dairy on "halves." The court said that such evidence was not sufficient to give the jury any pecuniary measure of the plaintiff's loss. See also Kethledge v. City of Petoskey, (1914) 179 Mich. 301, 146 N. W. 164. There the plaintiff, a girl of seventeen, had testified that by reason of her injuries she had been unable to finish her school course. The court did not say that such evidence was generally incompetent, but it did hold in the particular case that it was not certain that the plaintiff had been prevented from obtaining an education by reason of her injuries.

A satisfactory analysis of cases dealing with evidence of this sort where the action is one for personal injury, and this evidence is introduced to show the damage sustained, is difficult to make. For example, see the case of Ganz v. Metropolitan St. Ry., (Mo. 1920) 220 S. W. 490. In that case the plaintiff was an insurance agent, and was allowed to show besides his average commissions, a contract with the company whereby at the end of a certain period he would receive a bonus provided he had maintained a prescribed average. In determining whether or not a contract of that sort should have been considered by the jury in that particular case, the court cited other cases where the causes of action were based upon breaches of contracts for rentals and for employment. Remey v. Detroit United Railway, (1905) 141 Mich. 116, 104 N. W. 420, was a case where the injured plaintiff had been engaged to marry, and had to postpone her engagement indefinitely because of her injuries. The court said that such evidence was competent as proof of damage suffered, although a judgment in favor of the plaintiff was reversed on other grounds. In Young v. B. & B. Auto Express, etc., Corp'n, (1925) 3 N. J. Misc. 519, 128 Atl. 856, the plaintiff had suffered a temporary disability. He was allowed to show that during the time he was disabled, he had lost his milk business because he had been unable to attend to it, and that he had lost his flower plants because he had been unable to care for them. The court allowed the plaintiff to recover substantial damages of $7,500, but did not consider expressly the competency of the kind of evidence offered to show the extent of loss.

The discussion in the text on the matter of profits indicates the extent to which evidence of this sort can be used in personal injury cases.

[35]See Mahoney v. Boston Elev. Ry., (1915) 221 Mass. 116, 117, 108 N. E. 1033, "The principles upon which damages for personal injury caused by tort are assessed are settled. In general the plaintiff is entitled to such sum of money as will compensate him for the loss actually sustained by the injury to his person. . . Profits hoped to be derived in the future from a business are too remote and uncertain to be regarded as an element in estimating damages. . . That is not a personal injury but a property damage." See also Lo Schiavo v. Traction, Etc., Co., (1922) 105 Ohio St. 61, 67, 138 N. E. 372, 27 A. L. R. 424, "The authorities are therefore in accord that in actions for injuries to property, or business, or trade,

profits, or loss of social and business opportunities is more obvious. Common experience would indicate that their utility in evaluating personal injuries is limited. No rule of thumb can be devised to test the competency of these facts as evidence in any kind of case. That they may be material even in personal injury cases is illustrated by the courts' decisions on the matter of anticipated profits as evidence of earning capacity.

Where the profits are produced rather by capital investment than by the plaintiff's services they ought not be used to measure his earning power.[36] If the plaintiff is a business executive and is earning a salary he is in the position of any other wage earner. The control over his investments will not be affected by a plaintiff's physical disability. A professional man with a normal practice earns an average income over a period of years.[37] There is a general wage scale for those who have skilled trade.[38] That is not true, however, in the case of the small merchant, or the person who is conducting his own business, and who actively manages the enterprise. In his case the success of the business depends in a large measure upon his own services, and it is difficult to estimate his earning capacity without considering in some manner or other the profits which he has been making in his business.

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compensation must be made for the loss of profits, but that in an action for personal injuries the basic principle is compensation for loss of personal earnings, that is to say, for loss of the power to earn."

[36]Mahoney v. Boston Elev. Ry., (1915) 221 Mass. 116, 108 N. E. 1033. In the particular case the plaintiff conducted a tailor shop, but the court felt that the profits received therefrom were produced rather from capital invested than the plaintiff's own services. Rugg, J., on page 117, said: "Decrease in income is an element to be weighed, when it arises from inability to exercise personal effort or especial efficiency directly producing the income; but not when it is interwoven with profits derived from a business in which capital is employed and to the success of which the service, skill and zeal of others contribute."

[37]Terry Dairy Co. v. Parker, (1920) 144 Ark. 401, 223 S. W. 6, physician; Campbell v. Bradbury, (1918) 179 Cal. 364, 176 Pac. 685, lawyer; Baldwin v. Norwalk, (1921) 96 Conn. 1, 112 Atl. 660, physician; Ganz v. Metropolitan St. Ry. (Mo. 1920) 220 S. W. 490, insurance agent.

[38]In Union Traction Co. v. Taylor, (1922) 81 Ind. App. 257, 135 N. E. 255, the plaintiff was a city fireman and a painter by trade. He was allowed to give evidence of his earning capacity in both occupations. In Kalland v. City of Brainerd, (1928) 141 Minn. 119, 169 N. W. 475 and Perry v. Pickwick Stages of Ore., (1926) Or. 598, 243 Pac. 787, the plaintiffs were apprentices in their respective trades. Both were allowed to show what the wage scales were in their trades. Cf. De Haas v. Penna. R. R. Co., (1918) 261 Pa. St. 499, 104 Atl. 733. The plaintiff in that case had just graduated from the state forestry school. He was allowed to testify as to the minimum wage of a forester in the state service. Cf. also Zibbell v. Southern Pacific Co., (1911) 160 Cal. 237, 116 Pac. 513. The plaintiff was a horse trainer and was allowed to testify that a man in his occupation earned from $2,000 to $10,000 a year.

It is argued that this kind of proof should be competent, not as a separate item, but as evidence from which the jury can estimate the value of the plaintiff's services.[39] On the other hand, it is pointed out, that the amount of profits, even in a business of this sort, may depend upon general business conditions, apart from the services of the proprietor.[40] Where the plaintiff is a peddler, with little money invested except in the goods he sells, his periodic profits may be compared with a regular wage.[41] Where the plaintiff has something invested in the business, and employs someone other than himself, the Ohio court has said that it is error to present the matter of profits to the jury under any form of instructions.[42] The Pennsylvania court went not quite so far. It held that, in the particular case, it was error to have presented the matter of profits which the plaintiff had been making in his business, because he had introduced no evidence to show that the decrease in profits could not have been caused by any fact other than his absence from the business.[43]

The trial court faces a dilemma in these cases. What a plaintiff would have to pay to another man to fill his place would not necessarily be satisfactory evidence of the value of the plaintiff's services. A decrease in profits in the business, as was suggested above, may be due to several causes.. There is the danger that if the jury has both sets of facts before them they may overvalue the plaintiff's services. Nevertheless, where the

[39]Texas Electric Ry. v. Worthy, (Tex. Civ. App. 1923) 250 S. W. 710; See also the instructions of the trial court in Lo Schiavo v. Traction Co., (1922) 106 Ohio St. 61, 138 N. E. 372, 27 A. L. R. 424.

[40]See Dempsey v. City of Scranton, (1919) 264 Pa. St. 495, 107 Atl. 877.

[41]Sheperdson v. Storrs, (1923) 114 Kan. 148, 217 Pac. 290; Bagley v. Kimball, (Mass. 1929) 167 N. E. 661; Laycock v. United Railways Co., (1921) 290 Mo. 344, 235 S. W. 91; Rabinowitz v. Hawthorne, (1916) 89 N. J. L. 308, 98 Atl. 315; Rosenthal v. Harker, (1920) 56 Utah 113, 189 Pac. 666.

[42]Lo Schiavo v. Traction Co., (1922) 106 Ohio St. 61, 138 N. E. 372, 27 A. L. R. 424. Cf. Franklin Motor Car Co. v. Dyer, (1928) 29 Ohio App. 241, 163 N. E. 568. The plaintiff was a contracting plumber. Purporting to follow the Lo Schiavo Case, the court said, that profits which the plaintiff had been making in his business were inadmissible, but that it was proper for the plaintiff to show what he would have earned as a journeyman plumber. Cf. also Murphy v. Pittsburgh Rys. Co., (1928) 292 Pa. St. 191, 140 Atl. 897. The plaintiff was there also engaged in the trucking business, and had been driving one of his own trucks. He was disabled permanently so that he could no longer drive a truck, but he was still able to manage his own business. He testified to what it would cost him to hire a man to fill his place not as showing a kind of special expense, but as evidence of what his own earning capacity had been.

[43]Dempsey v. City of Scranton, (1919) 264 Pa. St. 495, 107 Atl. 877.

plaintiff's business income does depend upon his personal services, it would seem that the trial court can allow some facts concerning the plaintiff's business, such as gross income, number of employees, salaries paid out, and the like, to go before the jury.[44] It gives the jury a basis for making an evaluation based upon earning capacity.

Instructions on impairment of earning capacity must convey to the jury more than the idea that the jury's task is to find merely what the plaintiff's earning capacity would have been had he not been injured. To measure the impairment of the plaintiff's capacity the jury must take into consideration whether his earning power was likely to continue as it was at the time of the injury and how long the plaintiff would have continued to exercise any earning power at all.[45] Probable increases and probable decreases in the plaintiff's wage scale should be taken into account.[46] Facts

[44]McGlinchy v. Henderson, (1922) 240 Mass. 432, 134 N. E. 264 and Yenney v. Pacific Northwest T. Co., (1923) 124 Wash. 669, 215 Pac. 38, where the plaintiffs were small storekeepers; Galanis v. Simon, (1927) 222 App. Div. 330, 225 N. Y. S. 673, where the plaintiff conducted a tailor shop; Alitz v. Minneapolis & St. L. Ry. Co., (1923) 196 Iowa 437, 193 N. W. 423, where the plaintiff was a farmer; Faber v. Gimbel Bros., (1919) 264 Pa. St. 1, 107 Atl. 222, where the plaintiff conducted a small machine shop. But see Worez v. Des Moines City R. Co., (1916) 175 Iowa, 1, 156 N. W. 867, where the plaintiff, a married woman, kept boarders, and was not allowed to show the profits she had been making from that source; and see also Normandin v. Kansas City, (Mo. App. 1918) 206 S. W. 913, in which the court held that evidence of profits which the plaintiff had made out of a hog raising partnership in the eight months before the trial were inadmissible. Cf. Muncey v. Pullman Taxi Service Co., 269 Pa. St. 97, (1920) 112 Atl. 30, where the plaintiff had been conducting a private detective agency and had claimed a permanent impairment of earning capacity as a result of his injury. The judgment for the plaintiff was reversed in the appellate court because, it was said, there was lack of evidence from which the jury could have estimated earning capacity. The court said that the plaintiff should have introduced books of account. To the same effect was the decision in the case of Panhandle & S. F. Ry. Co. v. Reed, (Tex. Civ. App. 1925) 273 S. W. 611, where the plaintiff was the owner of a traveling carnival. One may raise the question in the latter case as to whether the plaintiff's income from the business must have been derived rather from the capital he had invested in the business than because of his own services therein. Cf. also McCullogh v. Holland Furnace Co., (1928) 293 Pa. St. 45, 141 Atl. 631, where the plaintiff was a magician. He was allowed to show what an act of this kind would normally bring in, together with his expenses of operation.

[45]Bosher v. International Rv. Co., (D.C. N.Y. 1926) 15 F. (2d) 388; Coast S. S. Co. v. Brady, (C.C.A. 5th Cir. 1925) 8 F. (2d) 16.

[46]This proposition is subject to some qualification. The jury is to consider what normally happens in any occupation, that wages decrease as a man gets older, or increase with skill as the case may be. The defendant may object, however, when the plaintiff tries to show that in his particular occupation wages have increased since he was injured, or that wages would be likely to increase, or that he was in line for promo-

like the plaintiff's life expectancy, his general health, the conditions of his particular line of employment, and the ordinary chances of life should all be considered.[47] The future losses should be reduced to their present worth or present value.[48]

Mortality tables are competent but not essential evidence of life expectancy.[49] When they are introduced, the trial judge must caution the jury to give due weight to the factors of chance and accident upon the plaintiff's expectancy.[50] Annuity tables, too, are usually competent but not essential.[51] They are helpful in

tion. In the occupation of the railroad trainman promotion depends upon seniority. It has been held proper in such a case for the plaintiff to show where he stood on the seniority list. Bradley v. Interurban Ry. Co., (1921) 191 Iowa 1351, 183 N. W. 493; see also Baker, v. Southern Pacific Co., (1920) 184 Cal. 357, 193 Pac. 765. Cf. Fort Worth & D. C. Ry. v. Smithers, (Texas Civ. App. 1923) 249 S. W. 286, (Comm. of App. Tex., 1925) 272 S. W. 764, where the plaintiff was a hostler's helper in a railroad shop. There was no seniority list from which promotions were made to the position of fireman. It was held that it was improper to introduce any evidence as to a probable promotion from hostler's helper to fireman. Evidence of a new wage scale in effect after the accident has been held admissible. Nelson Creek Coal Co. v. Bransford, (1923) 201 Ky. 778, 258 S. W. 289; Keathley v. Railway Co., (1919) 85 W. Va. 173. 102 S. E. 244. Cf. Payne v. Lyon, (1922) 154 Ga. 501, 114 S. E. 892, where the court said it was error to allow the jury to take into account particular future increases in the wage scale unless the plaintiff had a contract for such advances in wages. Cf. also Inspiration Consolidated Copper Co. v. Lindley, (1918) 20 Ariz. 95, 177 Pac. 24, where the court said that to instruct the jury to consider the plaintiff's "probable chances, if any, of increased earnings had he not been injured" was misleading. Probable earnings, it was said, were too speculative, and a separate instruction served to over-emphasize what was already included within the charge on "loss of earnings, if any, in the future of his life." The alleged error was found to have been harmless.

[47]See the cases cited above in note 45 and note 46, and those cited below in notes 49 and 50.

[48]Chesapeake & Ohio R. Co. v. Dixon, (1926) 212 Ky. 738, 280 S. W. 93, (1927) 218 Ky. 84, 290 S. W. 1064; Cincinnati, N. O. & T. R. R. Co. v. McWhorter, (1925) 210 Ky. 108, 275 S. W. 363; Nagi v. Detroit United Railway, (1925) 231 Mich. 452, 204 N. W. 126; Rigley v. Pryor, (1921) 290 Mo. 10, 233 S. W. 828; Taylor v. Construction Co., (1927) 193 N. C. 775, 138 S. E. 129.

[49]Morris v. Le Bahn, (1922) 194 Iowa 377, 189 N. W. 797; Webb v. Omaha & S. I. Ry. Co., (1917) 101 Neb. 596, 164 N. W. 564; see the instruction of the trial judge as stated in Inge v. Seaboard Air Line Ry. Co., (1926) 192 N. C. 522, 532, 135 S. E. 522. There must be evidence that the injury is permanent. Atlantic Coast Line R. R. Co. v. Anderson, (1926) 35 Ga. App. 292, 133 S. E. 63; Penley v. Teague & Harlow Co., (1928) 126 Me. 583, 140 Atl. 374; Peters v. Kansas City Ry. Co., (1920) 204 Mo. App. 197, 224 S. W. 25.

[50]Western & Atlantic R. Co. v. Smith, (1916) 145 Ga. 276, 88 S. E. 983; Cornell v. Great Northern Ry. Co., (1920) 57 Mont. 177. 187 Pac. 902; McCaffrey v. Schwartz, (1926) 285 Pa. St. 561, 132 Atl. 810; Borland v. Pacific Meat & Packing Co., (Wash. 1929) 279 Pac. 94.

[51]Annuity and mortality tables are usually considered together.

aiding the jury to reduce prescribed sums to present value. Here, too, the jury must be cautioned to consider all the conditions and chances that might have caused fluctuations in the plaintiff's earnings had he been able to continue at his employment.

It is difficult for the trial court to give the jury any formula for computing present value. But it is quite generally conceded that the trial court should give some instructions on the subject.[52] Ordinarily a general statement to the jury that, in compensating the plaintiff for impairment of earning capacity, they should reduce the future losses to their present worth is sufficient.[53] It is even said that a failure to instruct on present value where the defendant has not requested a special instruction is not erroneous.[54] The reasoning behind the present value rule seems plausible. A plaintiff ought not recover a lump sum measuring the accumulated losses of the future years. Nor should he have a principal sum that will bear an annual rate of interest equal to the wages he has earned, because that would leave the principal sum intact at his death. The present value of the future losses of this kind, it is said, is such a sum as will produce an annual rate of interest that together with a portion of the principal sum will afford to the plaintiff what his earned income would have been each remaining year of his life and be completely used up by the time of his death.[55] The difficulties in working with any such formula are obvious.

The same cases discuss both kinds of evidence. See the cases cited in notes 49 and 50. A distinction is made between the use of the two kinds of tables in McCaffrey v. Schwartz, (1926) 285 Pa. St. 561, 132 Atl. 810. The appellant in the case raised the objection that annuity tables had not been introduced, so that the jury could not compute present value. The court said that it was not only unnecessary to use annuity tables in computing present value, but that such evidence was incompetent. The annual wage of any man, said the court, is not likely to remain the same from year to year. Cf. Borland v. Pacific Meat & Packing Co., (Wash. 1929) 279 Pac. 94.

[52]Chicago & N. W. Ry. Co. v. Ott, (1925) 33 Wyo. 200, 237 Pac. 238, 238 Pac. 287. See also the cases cited in note 48.

[53]Rigley v. Pryor, (1921) 290 Mo. 10, 233 S. W. 828; Hill v. Railroad Co., (1920) 180 N. C. 490, 105 S. E. 184; Snyder v. Reading Co., (1925) 284 Pa. St. 59, 130 Atl. 398. Cf. Bart v. Scheider, (Ga. App. 1929) 147 S. E. 430, where the court said that, in the absence of a special request, it was not a mistake for the trial judge to have omitted to instruct the jury on the mathematical process for reducing a future payable sum to its present worth.

[54]Giroud v. Andryshowich, (1928) 6 N. J. Misc. 47, 139 Atl. 898; Cuthbertson v. Hoffar, (1927) 205 Iowa 366, 216 N. W. 733; McCaffrey v. Schwartz, (1926) 285 Pa. St. 561, 132 Atl. 810.

[55]See Chesapeake & Ohio Ry. v. Kelly, (1916) 241 U. S. 485, 491, 36 Sup. Ct. 630, 60 L. Ed. 1117, "We are not in this case called

Where impairment of earning capacity is in the case, the trial judge may refuse to present to the jury as a separate item the fact of the plaintiff's physical disability. The defendant can object that to do so would allow the jury to give the plaintiff double damages. The objection is not made because there is too much evidence, but because the jury may use the same evidence twice. It is argued that the physical injury includes impairment of earning capacity, and that if the latter item is present, the jury ought not consider again the fact of the plaintiff's physical disability.[56] Most courts look upon the objection as specious.[57]

upon to lay down a precise rule or formula, and it is not our purpose to do this, merely to indicate some of the considerations that support the view we have expressed that, in computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made for the earning power of money." In Hill v. Railroad Co., (1920) 180 N. C. 492, 494, 105 S. E. 184, the court said, "This rule [present value] is the correct one. Otherwise, a plaintiff would recover now for losses, by reason of diminished earning capacity, though they are sustained in ten, twenty, or even thirty years hence, without any consideration of the fact that he is not entitled to the whole of them presently, as these losses could only be incurred at various times in the future. Something, therefore, must be allowed, because he is compensated for them before the time when they would be actually suffered." In Gail v. Philadelphia, (1922) 273 Pa. St. 275, 279, 117 Atl. 69, the court said, "By this verdict, however, plaintiff needs no earning capacity; she can live without working, for this sum . . . will yield . . . more than the compensation she could possibly have earned annually, according to the testimony, during the remainder of her life, had she suffered no injury. Moreover, it leaves untouched at her death the entire principal sum. This is not fair . . . " See also the instructions of the trial court in Coast S. S. Co. v. Brady (C.C.A. 8th Cir. 1925) 8 F. (2d) 16, and in Cornell v. Great Northern Ry. Co., (1920) 57 Mont. 177, 187 Pac. 902.

[56]South Covington & C. St. Ry. Co. v. Vanice, (1925) 211 Ky. 774, 278 S. W. 116; Western & Atlantic R. R. Co. v. Smith, (1916) 145 Ga. 276, 88 S. E. 983. In the latter case the trial judge had instructed the jury that, if they found for the plaintiff, he would be entitled to recover for the injury sustained, "then" for the loss of time, "then" for doctor's bills, and "then" for decreased capacity of labor. The court said, page 281, "The word 'then' is sometimes an adverb of time meaning existing, acting at, or belonging to the time mentioned; and is sometimes a conjunction signifying in that case, in consequence, as a consequence, therefore, for this reason. Possibly it was in the latter sense that the court intended to employ the word, and it may have been his purpose to state first the general proposition that the plaintiff, if entitled to recover at all, would be entitled to recover for the injury sustained, and to follow this with a statement of the different elements which might in certain circumstances go to make up the aggregate of damages which could be recovered 'for the injury sustained.' But, if so, it was not clear, and the charge might have had a tendency to cause the jury to allow double damages." Cf. Hunt v. Callihan, (1925) 209 Ky. 730, 273 S. W. 555, in which it was conceded that an instruction on loss of time and permanent impairment of earning power might mislead a jury into awarding double damages if the division between the two

The court may even concede that the physical disability, apart from any other items which are present, ought to be considered by the jury as a separate factor.[58]

III. The Function of the Jury

After the case is submitted to the jury, it is their duty to evaluate the injury to the plaintiff. There is no definite procedure. The jurors must conduct themselves as in any other case. The verdict should not be a quotient verdict, nor the result of chance, nor should the jurors give evidence in the jury room.[59] These rules, if violated, are seldom noted, because under the general verdict there is no way of inquiring into the jurors' manner of arriving at their conclusions.[60] In the absence of some palpable misconduct,[61] where the case has been properly submitted, and there is sufficient evidence to support it, the jury's verdict will stand.

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were not made clear. Loss of time was so unimportant an item in the case, and pain and suffering great enough, that the verdict for $1,032 was allowed to stand. Cf. also Collinson v. Cutter, (1919) 186 Iowa 276, 170 N. W. 420, where the objection was raised that the jury might allow double damages when the trial court instructs on pain and suffering and on disfigurement. The court did not sustain the objection.

[57]Sun Oil Co. v. Rhodes, (C. A. A. 8th Cir. 1926) 15 F. (2d) 790; Soltesz v. Belz Provision Co., (Mo. 1924) 260 S. W. 990; Farthman v. MacMahon, (Mo. App. 1924) 258 S. W. 61; Chesapeake & Ohio Ry. Co. v. Arrington, (1919) 126 Va. 194, 101 S. E. 415.

[58]Banks v. Morris & Co., (1924) 302 Mo. 254, 257 S. W. 482; see Barclay v. Wetmore & Morse Granite Co., (1920) 94 Vt. 227, 110 Atl. 1.

[59]Beakley v. Optimist Printing Co., Ltd., (1915) 28 Idaho 67, 152 Pac. 212, tossing of a coin; Ottawa v. Gilliland, (1901) 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232, quotient verdict; cf. Newell v. Detroit, etc., Railroad Co., 235 Mich. 687, 689, 209 N. W. 813; Simmons v. Fish, (1912) 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1913D. 588, compromise verdict; Thoreson v. Quinn, (1914) 126 Minn. 48, 147 N. W. 716, juror's visiting the scene of the accident without permission. See Doody v. Railroad, (1914) 77 N. W. 161, 89 Atl. 487, Ann. Cas. 1914C, 846, where the court said that from the size of the verdict it was apparent that the jury had compromised to fix liability at a small figure. The new trial had to extend to every issue in the case and not merely to the matter of damages; there was more than mere inadequacy of damages involved.

[60]In McDonald v. Pless, (1915) 238 U. S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300, it was conceded that a quotient verdict was bad, but the court held that the verdict in the case could not for any reason be attacked by the affidavit of any of the jurors. See Beakley v. Optimist Printing Co., Ltd., (1915) 28 Idaho 67, 152 Pac. 212, where by statute the verdict could be attacked by the affidavit of a juror on the ground of misconduct.

[61]Underwood v. Old Colony St. Ry. Co., (1910) 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318. A new trial was ordered because the juror had revealed by his own conduct that he had been intoxicated during the trial of the case.

IV. The Review of the Case After the Trial

The Instructions.—On a motion for a new trial, or in the appellate court, the translation of the problem of evaluation to the jury by the trial judge may be attacked as erroneous. The objection must have been properly presented. Whether the point can be taken at the time it is raised will depend upon the rules of practice in the particular jurisdiction. For the purposes of this discussion it can be assumed that the objections have been properly taken and saved. The appellant contends that the trial court has erred in its instructions on the measures of damages. Here, too, one must expect to find the courts dealing with the problem as if the jury is to compensate the plaintiff for the separate items of loss which are in the case. That the consideration of the various items in assessing damages is a part of the process of evaluating the plaintiff's hurt is not generally recognized, even by the judges of the appellate courts.

Judgments may be reversed on appeal where the trial judge has committed error in charging the jury on the matter of liability and has also misinformed them about the items to be used in assessing damages.[62] Often the appellate courts will prescribe what the rules for measuring damages should be when they are considering only the matter of excessiveness or inadequacy of the award. Comparatively few instances occur where the appellate courts reverse judgments in favor of the plaintiff solely on the ground of erroneous instructions on the so-called measures of damages.[63]

[62]See the following cases as illustrations. In each one there was said to be reversible error either in the trial judge's rulings on evidence or in his instructions on general liability as well as in his charge on the measures of damages. Pawnee Co. v. Powell, (1924) 76 Colo. 1, 227 Pac. 836, 37 A. L. R. 6; Payne v. Lyon, (1922) 154 Ga. 501, 114 S. E. 892; Borough v. Minneapolis & St. L. R. Co., (1921) 191 Iowa 1216, 184 N. W. 320; Cincinnati N. O. & T. R. R. Co. v. McWhorter, (1925) 210 Ky. 108, 275 S. W. 363; Louisville & N. Co. v. Deering, (1920) 188 Ky. 708, 223 S. W. 1095; Cornell v. Great Nor. Ry. Co., (1920) 57 Mont. 177, 187 Pac. 902; Telinde v. Ohio Traction Co., (1923) 109 Ohio St. 125, 141 N. E. 673.

[63]To the cases discussed in the text, the following illustrations may be added: Western & Atlantic R. Co. v. Smith, (1916) 145 Ga. 276, 88 S. E. 983, where the instructions were subject to the double damage criticism and where the trial court had failed to instruct the jury properly on the use of mortality and annuity tables; Dowdy v. McGuire, (1926) 216 Ky. 374, 287 S. W. 948, where the judgment was reversed because the trial court had failed to instruct the jury as to the highest amount of each item which the plaintiff could recover; Taylor v. Construction Co., (1927) 193 N. C. 775, 138 S. E. 129, where a judgment was reversed because of erroneous charges on present

The Kentucky court of appeals did so in a recent case.[64] The judgment was reversed because the trial judge in his instructions had paraphrased impairment of earning power into decreased capacity to work and labor. In the same case the appellate court said that the judge's instructions were erroneous for another and similar reason, because they would allow the jury to award double damages. The Pennsylvania supreme court reversed a judgment in favor of the plaintiff because the trial judge had allowed the use of mortality tables in evidence and had failed to caution the jury sufficiently as to their weight.[65] Moreover, the trial judge in that case had told the jury to allow the plaintiff compensation for his future loss of wages instead of impairment of earning capacity, and that, too, was said to be error. In another Kentucky case, the judgment for the plaintiff was reversed because the court had failed to give a requested instruction on present value.[66] In these cases the questions of liability had been settled in favor of the plaintiffs, and the matter of excessiveness of the damages was not raised in any of them.

value and life expectancy; Shipp v. Stage Lines, (1926) 192 N. C. 475, 135 S. E. 339, where the trial court had failed to instruct properly upon impairment of earning capacity in the case of a minor; LeVan v. McLean, (1923) 276 Pa. St. 361, 120 Atl. 395, where the judgment was reversed because the trial court had presented to the jury specific sums as examples for them to use in calculating the present value of his future losses, the only future losses being pain and suffering, and the specific sums having a probable harmful effect upon the jury. Cf. the following cases with those just cited: Georgia Ry. & Power Co. v. Britt, (1923) 31 Ga. App. 54, 119 S. E. 460, and Batts v. Home Tel. & Tel. Co., (1923) 186 N. C. 120, 118 S. E. 893, in both of which it was said to have been erroneous for the trial court to have presupposed a total disability when the evidence did not support it. In these two cases the judgments were reversed, because of a lack of evidence to support the instructions rather than because of erroneous statements of any rules. See also Hasse v. McCown, (1926) 89 Pa. Super. Ct. 334, where judgment was reversed upon the plaintiff's appeal because the court had erroneously refused to instruct on impairment of earning capacity when there was evidence to support such an instruction.

[64]South Covington & C. St. Ry. Co. v. Vanice, (1925) 211 Ky. 774, 278 S. W. 116.

[65]McCaffrey v. Schwartz, (1926) 285 Pa. St. 561, 132 Atl. 810.

[66]Chesapeake & O. R. Co. v. Dixon, (1926) 212 Ky. 738, 280 S. W. 93, (1927) 218 Ky. 84, 290 S. W. 1064. The Kentucky court felt bound to follow the decision of the United States Supreme Court in Chesapeake & Ohio Ry. v. Kelly, (1916) 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117. Like the Kentucky case, the action there had been brought under the Federal Employers' Liability Act, but for wrongful death and not for personal injuries as in the Kentucky case. The error which the Supreme Court said was in the case and which had not been corrected in the state court, the Kentucky court of appeals, was the failure of the trial court to give a requested instruction on present value.

Literal compensation in a personal injury action is impossible. The size of the verdict will not vary directly with the words of the trial court's charge. So many rules for measuring damages can be devised that it is hopeless to expect from trial judges technically accurate statements in all cases based upon the evidence therein. Impaired earning capacity, pain and suffering, expense, and all such items are not to be considered as separate losses for which the plaintiff seeks compensation. His cause of action is for his physical injury. As the Connecticut court has said, in sustaining a judgment, although the trial judge had failed to instruct on present value, ". . . the only practical test is whether the total damages fall somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case."[67]

It is submitted that the test as laid down by the Connecticut court is a rational solution of a difficult matter. On occasion, other courts have applied the same kind of test. They have looked at all the evidence properly in the case, disregarding the alleged errors in the charge on measures of damages, to see whether the sum awarded to the plantiff has been commensurate with the injuries he has suffered.[68] That should be the general test. An

[67]Briggs v. Becker, (1924) 101 Conn. 62, 66, 124 Atl. 826.

[68]In Coast S. S. v. Brady (C.C.A. 5th Cir. 1925) 8 F. (2d) 16, the trial court had failed to caution the jury how to use the annuity tables that were in evidence, but the court said that it did not appear that the jury's verdict was thus any larger than it would otherwise have been. In Tucker v. Palmberg, (1916) 28 Idaho, 693, 155 Pac. 981, the loss of time had not been specially pleaded, but had been presented to the jury. That was error, the appellate court said, but had not been prejudicial because the verdict was not unreasonable as based upon the evidence which was properly in the case. In Leonhardt v. Green, (1916) 251 Pa. St. 579, 96 Atl. 1096, the trial judge had failed to give complete instructions in impairment of earning capacity, but the appellate court said that the damages allowed were not unreasonable. In Galveston, H. & S. A. Ry. Co. v. Mallott, (Tex. Civ. App. 1928) 6 S. W. (2d) 432, it appeared from the special findings that the jury had failed to take into account the instruction on present value. But the court said that considering pain and suffering and the nature of the injury, the verdict was not excessive. See also Inspiration Consolidated Copper Co. v. Lindley, (1920) 20 Ariz. 95, 177 Pac. 24; Hunt v. Callihan, (1925) 209 Ky. 730, 273 S. W. 555. In Buffalo v. City of Des Moines, (1922) 186 N. W. 844, 193 Iowa 194, the trial judge had instructed the jury to consider the plaintiff's impairment of earning capacity. The plaintiff was a married woman and there was no evidence in the case to show the pecuniary loss which the plaintiff had suffered by reason of any impairment of earning capacity, but the injury was permanent, and the court said that there was enough evidence to support the judgment. Cf. with this last case Zimmerman v. Weinroth, (1922) 272 Pa. St. 537, 116 Atl. 510. and Van Liew v. Atwood, (1921) 115 Wash. 580, 197 Pac. 921. In the Pennsylvania case, the judgment for the plaintiff was reversed, because

apt illustration is found in a recent opinion of the Arkansas court, where it was said, ". . . under the undisputed proof in this case, the jury has not returned a verdict in excess of the present value of the damages he has sustained by reason of the decreased earning capacity, without regard to pain and suffering, and the court's failure to so limit the instructions could not therefore be prejudicial."[69] If there is enough evidence in the case to support a reasonable award, and the award is reasonable, then the judgment should stand.

What the appellate court believes to have been an erroneous instruction on measures may have led to an award that is unreasonable. The general problem of excessive damages, and the curing of that excess by the filing of a remittitur for the excessive portion, will be discussed in connection with the appellate court's review of the jury's findings of fact. At this point it is important to notice that, where the instructions are said to be erroneous because of a mistake in presenting an item with a definite pecuniary measure to the jury, the court may affirm on condition that the plaintiff remit the amount of that item.[70] There are a few cases where the court makes use of the same process to correct an instruction on other items having no pecuniary measure.[71]

the trial court had instructed on impairment of earning capacity, and the appellate court found that there had not been sufficient evidence to support the instruction. In the Washington case the court held that an instruction on impairment of a wife's capacity to perform her household duties should not be given because there could be no pecuniary evidence of the value of those services. The judgment was reversed.

[69]Dierks Lumber & Coal Co. v. Tollett, (1928) 178 Ark. 199, 207, 10 S. W. (2d) 5, 7.

[70]In these cases it is rather a lack of proper evidence to support the instruction, than an erroneous statement of any rule. Usually the item is expense, and there has not been enough evidence in the case to show that the charges were reasonable, or that they were incurred by the plaintiff. The plaintiff may be allowed to file a remittitur for the amount he has claimed for the particular item. Bushnell v. Bushnell, (1925) 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785; Arnold v. Ft. Dodge, Des Moines & So. R. Co., (1919) 186 Iowa 538, 173 N. W. 252; Oliverious v. Wicks, (1922) 107 Neb. 821, 187 N. W. 73; Horton v. Childs Co., (1924) 208 App. Div. 765, 203 N. Y. S. 301, loss of time as well as expenses; Reilly v. Cohen, (1927) 5 N. J. Misc. 991, 139 Atl. 238, Coblentz v. Jaloff, (1925) 115 Or. 656, 239 Pac. 825; McCallam v. Gas Co., (1923) 93 W. Va. 426, 117 S. E. 148. Cf. Banks v. Morris & Co., (1924) 302 Mo. 254, 257 S. W. 482. Loss of wages had been limited by the pleadings to $900, but the evidence showed a $1,400 loss. Since the trial court had not told the jury to allow the plaintiff no more than $900 for that item, the plaintiff was ordered to remit the difference between what she had proved and what she had alleged.

[71]Brandt v. C. F. Smith & Co., (1928) 242 Mich. 217, 218 N. W. 803 and Nagi v. Detroit United Railway (1925) 231 Mich. 452, 204 N. W.

Whether the excess, supposedly caused by the trial judge's error, can be cured by this process, or only by a new trial, is a matter for the appellate court to determine. The new trial ought in any event be limited to the matter of damages. Where the mistake occurs in connection with an item having no definite measure, the defendant may claim a constitutional right to have the damages assessed by another jury. It is difficult to reject that claim with a logical answer. Considerations of convenience and practicability apparently are enough to persuade the court to act in spite of the appellant's contention.[72]

The Jury's Findings of Fact.—The appellate court may be called upon to review the jury's findings of fact. If the evidence is insufficient to show that the injury is as extensive as the plaintiff claims, then the judgment should be reversed and a new trial granted.[73] That may happen, for example, when the jury has allowed damages for a permanent injury, and the evidence does not show satisfactorily that the injury is permanent.[74] Where it is apparent that the amount of data in the record is insufficient to enable the jury to make a satisfactory award, and the lack of data is not due to the peculiar circumstances of the case, there is

126 where in both cases the court allowed a remittitur to correct instructions on present value; Bond v. St. Louis, San Francisco Ry. Co., (1926) 315 Mo. 987, 288 S. W. 777, where the court allowed a remittitur to correct an excess supposedly caused by the trial judge's failure to explain the maximum figure he had set for the jury's award; Seaboard Air Line R. Co. v. Watson, (1927) 94 Fla. 571, 113 So. 716, where the court allowed a remittitur to correct an instruction on present value.

[72]Alter v. Shearwood, (1926) 114 Ohio St. 560, 151 N. E. 667. In that case the intermediate court of appeal had ordered the plaintiff to remit a portion of the judgment to correct an erroneous instruction on impairment of earning capacity. The plaintiff complied. The defendant on appeal in the supreme court contended that he was entitled to a new trial. The court decided against him. No point was made that the alleged excess had been caused by an erroneous instruction as distinguished from a misconstruction of the evidence by the jury.

[73]Camel v. Sylvester, (1928) 6 N. J. Misc. 1085, 143 Atl. 763; Murphy v. Pennsylvania R., (1927) 292 Pa. St. 213, 140 Atl. 867; Knutson v. Stangle, (1928) 196 Wis. 334, 220 N. W. 375. Cf. Reinert v. Atlantic City R. Co., (1927) 5 N. J. Misc. 399, 136 Atl. 300, where the judgment was reduced by remittitur because the court was not satisfied that the plaintiff's condition had been brought about by the injuries sustained through the defendant's act.

[74]Chicago, M. &. St. P. Ry. v. Holverson, (C.A.A. 8th Cir. 1920) 264 Fed. 597; Louisville & N. Co. v. Lewis, (1925) 211 Ky. 830, 278 S. W. 143; Poikanen v. Thomas Furnace Co., (1924) 226 Mich. 614, 198 N. W. 252; Cox v. Chicago G. W. R. Co., (1928) 173 Minn. 239, 217 N. W. 128; Zimmerman v. Pennsylvania R. Co., (Pa. 1929) 147 Atl. 82.

reason enough for granting a new trial.[75] No question of excessiveness is presented in these cases. The new trial, if granted, should extend to the matter of damages only.[76]

If the damages are excessive or inadequate, either the trial judge or the appellate court may direct a new trial on that ground alone. They have the power to do so by common law, and in many states expressly by statute.[77] In some states there are

[75]Louisville & N. R. R. Co. v. Ashley, (1916) 169 Ky. 330, 183 S. W. 921, L. R. A. 1916E, 763, in which the plaintiff had proved no special damages but was allowed by the jury $1,200 for arm and shoulder bruises; Muncey v. Pullman Taxi Service Co., (1920) 269 Pa. St. 97, 112 Atl. 30, where the plaintiff proved permanent injuries and alleged an impairment of earning power, but failed to introduce enough evidence from which the jury could calculate the plaintiff's earning capacity; Panhandle & S. F. Ry. Co. v. Reed, (Tex. Civ. App. 1924) 273 S. W. 611, where the situation was like that in the Muncey Case. Cf. Hanna v. Stoll, (1925) 112 Ohio St. 344, 147 N. E. 339, where a judgment was reversed on a matter of general liability as well as because there was no evidence upon which to base an allowance for impairment of earning power. Cf. also Georgia Ry. & Power Co. v. Britt, (1923) 31 Ga. App. 54, 119 S. E. 460; Batts v. Telephone Co., (1923) 186 N. C. 120, 118 S. E. 813; Hasse v. McCown (1926) 89 Pa. Sup. Ct. 334; Zimmerman v. Weinroth, (1922) 272 Pa. St. 537, 116 Atl. 510, and Van Liew v. Atwood (1921) 115 Wash. 580, 197 Pac. 921. It is doubtful whether the courts in any of these cases made any effort to test the reasonableness of the final result by the evidence that was properly in the case. That some item or items had been presented to the jury without enough facts to support them was enough to destroy the verdicts.

[76]See Camel v. Sylvester, (1928) 6 N. J. Misc. 1085, 143 Atl. 763, and Cox v. Chicago, G. W. R. Co., (1928) 173 Minn. 239, 217 N. W. 128. In both of these cases the new trial was directed to the matter of damages only. In the Cox Case, at the second trial, the jury allowed the plaintiff a greater amount of damages, $16,000 instead of $15,000, and the appellate court ordered the plaintiff to remit $4,000. Cox v. Chicago G. W. R. Co., (1929) 176 Minn. 437, 223 N. W. 675.

[77]Several early English cases recognized that the appellate courts had the power to order new trials where the amount of damages found was either excessive or inadequate. These early precedents did not concern injuries to the plaintiffs' physical person, but they were not cases. See Wood v. Gunston, (1655) Style 466, Ash v. Ash, Comb., (1696) 357; Chambers v. Robinson, (1726) 1 Strange 691; Beardmore v. Carrington, (1764) 2 Wils. 244.

It is to be noted that in the American States, where the statutes purport to cover this matter expressly, the new trial generally is said to be proper where the verdict is excessive or inadequate in amount by reason of passion or prejudice upon the part of the jury. Some of the statutes mention excessiveness only. The statutory provisions are as follows: Alabama, Code 1928 sec. 9518, both; Arkansas, Crawford and Moses' Digest of the Statutes, 1921, sec. 1311, excessiveness only; Arizona, Revised Statutes 1913, sec. 584, both; California, Code of Civil Procedure, sec. 657, excessiveness only; Colorado, Code of Civil Procedure 1921, sec. 237, both; Idaho, Compiled Statutes, 1919, sec. 6888, excessiveness only; Indiana, Burns' Annotated Statutes, 1926, sec. 610, excessiveness only; Iowa, Code 1927, sec. 11550, excessiveness only; Minnesota, Mason's General Statutes, 1927, sec. 9325, both; Montana, Revised Code 1921, sec. 9397, both; Nebraska, Compiled Statutes

statutes which prohibit the granting of a new trial in a case of this sort on the ground of inadequacy of damages.[78] The appellate courts seldom order new trials in these cases unconditionally. If the amount of damages is so excessive as to indicate passion or prejudice on the part of the jury, the appellate courts repeatedly say that they will reverse the judgment and grant a new trial. In some states it would seem that if the damages are so excessive as to indicate passion or prejudice, the court must order a new trial.[79] What is indicative of passion and prejudice, how much of an excess will destroy the whole verdict, remains for each court to decide in the particular case.[80] Certain it is that, in the

1922, sec. 8825, excessiveness only; Nevada, Revised Laws 1912, sec. 5320, excessiveness only; New York, Civil Practice Act, sec. 549, both; North Carolina, Code 1927, sec. 591, excessiveness only; North Dakota, Compiled Laws 1913, sec. 7660, excessiveness only; Ohio, Page's General Code 1926, sec. 11576, excessiveness only; Oklahoma, Compiled Statutes, 1921, sec. 572, excessiveness only; Oregon, Laws 1920, sec. 174, as limited by the amendment to article VII, 3c of the constitution, excessiveness only; South Dakota, Revised Code 1919, sec. 2555, excessiveness only; Texas, Compiled Statutes 1928, article 2235, both; Utah, Laws 1917, sec. 6978, excessiveness only; Virginia, Code 1924, sec. 6260, both; Washington, Remington's Compiled Statutes, 1922, sec. 399, both; West Virginia, Barnes' Code 1923, c. 131, sec. 15, both; Wisconsin Statutes 1927, sec. 270.49, both; Wyoming, Compiled Statute 1920, sec. 5870, excessiveness only. In other states, general provisions with regard to new trials may be held to include excessiveness or inadequacy of damages as sufficient ground for the granting of a new trial. See, for example, Kansas, Revised Statutes 1923, sec. 60-3001. Nor does it necessarily follow that if the statute does not expressly include inadequacy as a ground for the granting of a new trial, the court cannot order a new trial where it feels that the amount of the verdict has been insufficient. Cf. Torr v. United Railroads, (1921) 187 Cal. 505, 202 Pac. 671 with the provision in the California Code.

[78]Arkansas, Crawford & Moses' Digest of the Statutes 1921, sec. 1312; Indiana, Burns Annotated Statutes 1926, sec. 611; Oklahoma, Compiled Statutes 1921; sec. 573; Wyoming, Compiled Statutes 1920, sec. 5871.

[79]Davis Iron Works Co. v. White, (1903) 31 Colo. 82, 71 Pac. 384. See McCann v. Omaha & Council Bluffs St. Ry. Co., (Neb. 1929) 222 N. W. 633, 636, "It seems to be the general rule that a verdict of the character supposed [excessive because of passion and prejudice] cannot be cured by remittitur but should be set aside in toto."

[80]It is not often that the court will find an excess due to passion or prejudice that requires a new trial. In Palmer v. Security Trust Co., (1928) 242 Mich. 163, 218 N. W. 677, a verdict for $74,000 was said to be so excessive that it could not be cured by the filing of a remittitur. The plaintiff's two hands had been amputated. The opinion did not state what the plaintiff's income had been. In Flanery v. Chicago, M. & St. P. Ry. Co., (1924) 158 Minn. 384, 197 N. W. 747, it was said that a verdict of $10,000 which had been reduced to $6,000 at the order of the trial judge was so excessive as to indicate prejudice, but there were other grounds for reversal also. In Goldman v. Mitchell-Fletcher Co., (1925) 285 Pa. St. 116, 131 Atl. 665, two causes of action were tried by the same jury, the minor's action for personal injuries, and

great number of cases where the damages are thought to be excessive, the appellate court will not directly order a new trial, but will affirm the judgment on condition.[81] The condition is that

the mother's action for loss of services and expense. It was said that the amount allowed to the mother, since the girl was so close to maturity, was so great as to indicate that the jury had abused their powers. In another comparatively recent Pennsylvania case, Gail v. Philadelphia, (1922) 273 Pa. St. 275, 278, 117 Atl. 69, the court reversed a judgment on this ground, and said, "We have said repeatedly that a judgment will be reversed on appeal on account of an exorbitant verdict only where the impropriety of permitting it to stand is so clear as to show an abuse of discretion on the part of the court below in declining to set it aside."

If the judgment is reversed because of passion or prejudice upon the part of the jury, the new trial must be entire. The judgment is reversed, apparently, because the court feels that the passion or prejudice has pervaded the whole trial, and not merely the assessing of the damages. See Cox v. Chicago G. W. R. Co., (1929) 176 Minn. 437, 441, 223 N. W. 675, 677, in which the court said, "It is the rule in this state, and in many of the states, that an excessive verdict, appearing to indicate prejudice or passion on the part of the jury, may be cured by a proper reduction without a new trial, as long as the prejudice or passion is not shown to have affected the decision of the jury upon other issues of the case." See also Reeves v. Catignani, (Tenn. 1928) 7 S. W. (2d) 38. Cf. however, Illinois Cent. R. Co. v. Williams, (1926) 144 Miss. 804, 110 So. 510, and City of Greenwood v. Pentecost, (1927) 148 Miss. 60, 114 So. 259, where in both cases the court ordered an excess, supposedly due to passion and prejudice, upon the part of the jury, to be cured by the filling of a remittitur.

[81]As illustrative examples see the following cases: Pine Bluff Co. v. Bobbitt, (1927) 174 Ark. 41, 294 S. W. 1002, the plaintiff was a child of six, whose leg and body had been burned by a live wire, and judgment was reduced from $22,500 to $12,500; Brown v. Illinois Terminal Co., (1925) 237 Ill. App. 145, the plaintiff was a truck driver whose arm had been amputated, judgment was reduced from $15,000 to $12,000; Tartar v. Missouri, K. & T. R. Co., (1925) 119 Kan. 738, 241 Pac. 246, the plaintiff was a railroad laborer whose leg had been left permanently numb from his injury, and he was compelled to remit $5,000 from a judgment for $20,000; Schupback v. Mechevsky, (Mo. 1927) 300 S. W. 465, the plaintiff was a barber and had suffered an injury to his collar bone, judgment reduced from $8,000 to $6,000; McQuary v. Quincy, O. & K. C. Ry. Co., (1925) 306 Mo. 697, 269 S. W. 605, the plaintiff was an advertising promoter and had suffered internally from a weakened heart and other ailments, judgment reduced from $22,500 to $13,000; Dailey v. Sovereign Camp, (1921) 106 Neb. 767, 184 N. W. 920, the plaintiff was a city salesman, had been left a helpless cripple and suffered continual pain, judgment for $50,931 reduced to $40,931; Schmidt v. Public Service Ry. Co., (1927) 5 N. J. Misc. 161, 135 Atl. 690, the plaintiff was a factory foreman, suffered an injury to his arm and shoulder, judgment reduced from $17,000 to $12,000; Fried v. New York, New Haven & H. R. R. Co., (1918) 183 App. Div. 115, 170 N. Y. S. 697, the plaintiff was a telegraph lineman and had been burned by a live wire, judgment for $85,000 reduced to $55,000; Sullivan v. Minn., St. P. & S. Ste. M. R. Co., (1927) 55 N. D. 353, 213 N. W. 841, the plaintiff was a railroad crewman and had suffered a spine injury, judgment reduced from $20,000 to $12,000; Galveston, H. & S. A. Co. v. Andrews, (Tex. Civ. App. 1927) 291 S. W. 590, the plaintiff was a switching foreman and suffered the loss

the plaintiff file a remittitur for the amount of the excess or go to trial again.

The question of excessiveness in the amount of damages is narrow in scope. The evidence is sufficient to show the extent of the hurt. All the facts presented to the jury are clearly in the case, but the jury has allowed more, with the approval of the trial judge, than the appellate court believes it should have done. The appellate court reconsiders the same facts that were brought out at the trial, the extent of the injury, pain and suffering, and whatever else is in the case. The court may sustain the award.[82] Although large, the court may feel that the decreased

of one leg, judgment reduced from $40,000 to $30,000; Jackson v. Mitsui & Co., (1926) 138 Wash. 124, 244 Pac. 385, the plaintiff was a stevedore and suffered a fracture in his leg that left it permanently deformed, compelled to remit $12,500 from a judgment for $25,000.

In England it is recognized that a judgment may be reversed because the damages are excessive, but the House of Lords has held that a judgment entered upon a verdict that is excessive cannot be affirmed by an appellate court on condition that the plaintiff remit a portion of the damages, unless the defendant consents to the order. Watts v. Watts, [1905] A. C. 115. In that case the plaintiff's cause of action was based upon a libel. Cf. Lionel Barber & Co. v. Deutsche Bank, [1919] A. C. 304.

In some of the states, statutes have been adopted seeking to regulate the practice. They appear to be applicable primarily to the exercise of his power to deny a motion for a new trial on condition by the trial courts, but may be mentioned in connection with the cases cited above. Arizona, Revised Statutes 1913, secs. 577, 578; Massachusetts, General Laws 1921, c. 231, sec. 127; North Dakota, Compiled Laws 1913, sec. 7660 as amended, Annotated Supplement, 1925; Rhode Island, General Laws 1923, sec. 5120; Tennessee, Thompson's Shannon's Code 1918, sec. 4694a, 4694a-1; Virginia, General Laws 1924, sec. 6335.

Arkansas passed a statute which purported to require the consent of the defendant as well as of the plaintiff to the filing of a remittitur, and a release of errors by the defendant. This statute was held to be unconstitutional as it affected the appellate court's powers of review. St. Louis & N. A. R. Co. v. Mathis, (1905) 76 Ark. 184, 113 Am. St. Rep. 85, 91 S. W. 763. The statute is still on the books. Crawford & Moses' Digest of the Statutes of Arkansas 1921, sec. 1313. The Mississippi Code of 1906, sec. 4910, purported to prevent the trial court's curing a verdict by remittitur, but the section was declared unconstitutional. Yazoo, etc., R. R. Co. v. Wallace, (1907) 90 Miss. 609, 43 So. 469, 122 Am. St. Rep. 321. Cf. Arizona, Revised Statutes, 1913, sec. 598, "When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages and shall stand good in all other respects."

[82]As illustrative examples see the following cases: Missouri Pacific Rd. Co. v. Hendrix, (1925) 169 Ark. 825, 277 S. W. 337, the plaintiff was a locomotive engineman, his hand was crushed, judgment for $7,500; Driscoll v. California St. Ry. Co., (1926) 80 Cal. App. 208, 250 Pac. 1062, the plaintiff was a laborer, suffered fractures and bruises

purchasing power of the dollar makes the amount of damages a reasonable award.[83] The court may be persuaded to allow a large sum because the evidence shows that the plaintiff has suffered intensely.[84] It may believe that the graphic evidence at the trial would induce a jury and trial judge to give a larger award than the appellate court would allow from a reading of the cold record.[85]

If the court feels that the sum is too large, it may compare the judgment with those that have been allowed to stand where the injuries suffered have been like those sustained by the plaintiff.[86] Never will the court consider that out of the judgment

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and traumatic pleurisy, judgment for $15,000; Hayhurst v. Boyd Hospital, (1927) 43 Idaho 661, 254 Pac. 528, the plaintiff was a farm laborer, suffered exposure while at the defendant's hospital, contracted chronic tuberculosis, judgment for $15,250; Stolarcz v. Interstate Iron & Steel Co., (1920) 207 Ill. App. 7, the plaintiff was a laborer, suffered the loss of both eyes, judgment for $25,000; Union Traction Co. of Ind. v. Morris, (1923) 193 Ind. 313, 136 N. E. 861, the plaintiff was a bank cashier, became nervous as a result of the accident which left him with a shortened arm, judgment for $9,000; Elliot v. Roberts, (1927) 141 Wash. 689, 252 Pac. 131, the plaintiff was a policeman, suffered numerous fractures and bruises as a result of the accident, judgment for $14,980; West v. Day, (1927) 193 Wis. 187, 212 N. W. 648, the plaintiff was a young school girl, her foot and ankle were permanently disabled, judgment for $12,000.

[83]See City of Pineville v. Lawson, (1928) 225 Ky. 542, 9 S. W. (2d) 517; Powell v. Standard Oil Co., (1926) 168 Minn. 248, 210 N. W. 55; St. Louis, San Francisco Ry. Co. v. Stitt, (1923) 108 Okla. 42, 233 Pac. 1073. Even where the court feels that the verdict is excessive and orders a remittitur to be filed, it may still feel that the award is great, and that it can only be justified because of the decreased purchasing power of the dollar. See Cook v. Union Electric Supply Co., (1926) 2 R. I. Dec. 50, 113 Atl. 345; Dailey v. Sovereign Camp, (1921) 106 Neb. 767, 184 N. W. 920.

[84]See Byrd v. Galbraith, (1926) 172 Ark. 219, 288 S. W. 717; Rosander v. Market Street Ry. Co., (1928) 89 Cal. App. 710, 721, 265 Pac. 536, 541; Union Traction Co. v. McCullough, (Ind. App. 1926) 154 N. E. 41; Weasler v. Murphy Transfer & Storage Co., (1926) 167 Minn. 211, 208 N. W. 657; Skinner v. Davis, (1925) 312 Mo. 581, 280 S. W. 37; Gallivan v. Wark Co., (1927) 288 Pa. St. 443, 136 Atl. 223; Fort Worth Gas Co. v. Bragg, (Tex. Civ. App. 1927) 297 S. W. 244.

[85]See Kelley v. Hodge Transportation System, (1925) 197 Cal. 598, 242 Pac. 76, where the plaintiff was a young woman whose face had been severely cut by glass; Vowells v. Missouri Pac. R. Co., (Mo. 1928) 8 S. W. (2d) 7, where the plaintiff was also a young woman who had been crippled for life; Naccarato v. Pengelly, (1928) 148 Wash. 429, 269 Pac. 813, where the plaintiff had suffered only temporarily.

[86]In Kanieski v. Castantini, (1928) 243 Mich. 454, 220 N. W. 722, the court reduced a judgment from $13,615.20 to $10,000 and said, "A general review of the cases in which there are facts of a somewhat similar character enables one to determine that the amount of a verdict which does not fall within certain limits is unjust . . ." In Spencer v. Quincy, O. & K. C. R. Co., (1927) 317 Mo. 492, 297

the plaintiff's attorney may have to be paid.[87] If the amount is extremely large, in spite of the obviously severe pain and suffering which the plaintiff has had to endure, the court will be likely to measure the result by loss of earning capacity and present value only.[88] An appellate court uses no formula more certain than any used by the jury or trial judge. Its calculation must be made on the basis of its own experience.

Whether a verdict is large depends upon the facts in the case. Verdicts or judgments for more than $35,000, in personal injury cases, have been seldom sustained.[89] Only four cases have been

S. W. 353, the plaintiff had suffered an injured foot that remained permanently impaired and continually painful. The court reduced the judgment from $41,375 to $10,000, the ordinary sum allowed to one who suffers a loss of a leg. In Thompson v. Smith, (Mo. 1923) 253 S. W. 1023, the plaintiff was a young woman who had suffered the loss of a leg. The court said that $10,000 was the customary amount of damages. The jury had allowed the girl $15,000. Because the girl had incurred unusual expenses in effecting a cure, the court allowed the judgment to stand for $12,000. In P. Lorillard Co. v. Clay, (1920) 127 Va., 734, 104 S. E. 384, the plaintiff was a factory worker, and had lost the sight of one eye. After comparing the jury's allowance with that which had been sustained in other courts, the Virginia court affirmed the judgment on condition that the plaintiff remit $5,000 from his judgment for $15,000.

[87]The courts seldom express an opinion on this matter, but when they discuss compensation they fail to take the lawyer's fees into consideration. See, however, Fried v. New York, N. H. & H. R. R. Co., (1918) 183 App. Div. 115, 170 N. Y. S. 697. In that case the attorney was to get one half of the plaintiff's judgment.

[88]See Palmer v. Security Trust Co., (1928) 242 Mich. 163, 218 N. W. 677; Newell v. Detroit, etc., Railroad Co., (1926) 235 Mich. 687, 209 N. W. 813; Lovett v. Terminal Ry. Co., (1927) 316 Mo. 1246, 295 S. W. 89; O'Hara v. Davis, (1923) 109 Neb. 615, 192 N. W. 215; Martin v. Cohen, (N. J. Sup. 1929) 144 Atl. 178; Chicago & N. W. Ry. Co. v. Ott, (1925) 33 Wyo. 200, 237 Pac. 238, 238 Pac. 287.

[89]The following list does not purport to be an exhaustive list of all the cases. It is submitted that it does contain most, if not all of them, that have been decided in the last ten years. Hammond v. Pennsylvania R. Co., (D.C. N.Y. 1926) 15 F. (2d) 66, $47,000 in the case of a railroad fireman totally disabled; Bosher v. International Ry. Co., (D.C. N.Y. 1926) 15 F. (2d) 388, $45,000 in the case of a man whose one leg was amputated, the other crushed, and who had been earning $1,385 a year; General, etc., Car Corp. v. Melville, (1926) 198 Ind. 529, 145 N. E. 890, $35,000 in the case of a street car conductor whose one leg had been amputated and the other permanently crippled; Chicago, I. & L. Ry. Co. v. Stierwalt, (1926) 87 Ind. App. 478, 153 N. E. 807, $42,000 for a railroad brakeman both of whose legs had been amputated; Carlson v. Payne, (1921) 150 Minn. 480, 186 N. W. 291, $45,000 for a boy of twenty, who had been working in the freight yards and had suffered the loss of both arms; Bond v. St. Louis, San Francisco Ry. Co., (1926) 315 Mo. 987, 288 S. W. 777, $35,000 for a railway mail clerk who had been totally disabled; Span v. Jackson, Walker Coal & Mining Co., (Mo. 1929) 16 S. W. (2d) 190, $50,000 for a coal miner, 36 years old, who had been earning $2,000 a year, and was left paralyzed for life as a result of his injuries; O'Hara v. Davis,

found where the appellate courts have allowed more than $50,000 to stand as a final judgment in this class of cases.[90] The Ohio supreme court sustained a judgment for $75,000 in the case of a young man, a merry-go-round operator, who had been earning $5,000 a year, and had been totally disabled by the injury he had suffered.[91] One may speculate on the size of the award that would be allowed to stand in the case of a skilled surgeon, or musician, earning $50,000 a year, and suffering the loss of both hands. Courts have indicated that some limit must be placed beyond which no judgment can stand.[92] If the legislature sets no limit, it is said, the court should fix one.[93]

Both the trial court and the appellate courts make use of their power to sustain verdicts or judgments conditionally.[94] Most often

(1923) 109 Neb. 615, 192 N. W. 215, $37,500 for a boy eighteen years old, a laborer, who had suffered a total loss of eyesight; Dailey v. Sovereign Camp, (1920) 106 Neb. 767, 184 N. W. 920, $40,931 for a city salesman left totally disabled and subject to continual pain after the accident; McKeon v. Delaware, L. & W. R. Co., (1924) 100 N. J. L. 258, 127 Atl. 34, $50,000 to a young man who had been earning $20 a week, and who had suffered the loss of both legs; Inge v. Seaboard Air Line Ry., (1926) 192 N. C. 522, 135 S. E. 522, $35,000 for a railway yard conductor whose leg had been amputated; Gallivan v. Wark Co., (1927) Pa. St. 443, 136 Atl. 223, $35,000 in the case of an employee of a building contractor who had been earning $50 to $55 a week and who had suffered severe and permanent injuries from burns about the head and hands; Wilson v. Consolidated Dress Beef Co., (1929) 295 Pa. St. 168, 145 Atl. 81, $35,000 for a young married woman whose head had been crushed and permanently distorted; McEachran v. Rothschild & Company, (1925) 135 Wash. 260, 237 Pac. 711, $35,000 for a material checker who had been left with serious heart trouble as a result of the accident.

[90]Phillips v. London & Southwest'n Railway Co., L. R. (1879) 5 C. P. Div. 280, £16,000 in the case of a physician; Zibbell v. Southern Pacific Co., (1911) 160 Cal. 237, 116 Pac. 513, $70,000 for a young man, a horse trainer, earning from $2,000 to $10,000 a year, and who had been totally disabled; Fried v. New York, New Haven & H. R. R. Co., (1918) 170 N. Y. S. 697, 183 App. Div. 115, $55,000 for a telegraph lineman burned seriously by a live wire; Toledo, C. & O. Rd. Co. v. Miller, (1923) 108 Ohio St. 388, 140 N. E. 617, $75,000 for a young man, the operator of a merry-go-round, who had suffered the loss of both legs.

[91]Toledo, C. & O. Rd. Co. v. Miller, (1923) 108 Ohio St. 388, 140 N. E. 617. At the first trial in this case the plaintiff had a verdict for $75,000, which the trial court had ordered reduced to $45,000. The plaintiff had accepted that amount, but the defendant had appealed and the case was reversed because of an error on a point other than damages. The judgment for $75,000 was affirmed after the second trial.

[92]Carlson v. Payne, (1921) 150 Minn. 480, 186 N. W. 291.

[93]See Carlson v. Payne, (1921) 150 Minn. 480, 186 N. W. 291.

[94]See note 81 for illustrations of statutes. As illustrative examples where the trial court has ordered a remittitur, and where the amount thus allowed has stood even upon appeal, see the following cases: Bosher v. International Ry Co., (D.C. N.Y. 1926) 15 F. (2d) 388

when the trial judge makes such an order the plaintiff accepts the reduced amount. If he can appeal, the order of the trial judge will usually be affirmed.[95] Inadequacy in the original verdict may be the basis for the granting of a new trial if that ground has not been removed by statute.[96] The defendant is the party who

$54,000 to $45,000; Hammond v. Penna. R. R. Co. (D.C. N.Y. 1926) 15 F. (2d) 66, $77,000 to $47,000: Zibbell v. Southern Pac. Co., (1911) 160 Cal. 237, 116 Pac. 513, $100,000 to $70,000; Buffalo v. City of Des Moines, (1922) 193 Iowa 194, 186 N. W. 844, $12,000 to $7,500 in the case of a young woman whose wrist had been broken and permanently disabled; Powell v. Standard Oil Co., (1926) 168 Minn. 248, 210 N. W. 55, $30,000 to $25,000 for a farmer, who had been seriously burned about the head and shoulders; Woods v. St. Louis Mer. Bridge Ter. Ry. Co., (Mo. 1928) 8 S. W. (2d) 922, $50,000 to $30,000 in the case of a switchman whose leg had been amputated and arm partly disabled; Russel v. Missouri Pacific R. Co., (1927) 316 Mo. 1303, 295 S. W. 102, $40,000 to $15,000 for a carpenter whose eye sight had been seriously impaired; Fredericks v. Atlantic Ref. Co., (1925) 282 Pa. St. 8, 127 Atl. 615, 38 A. L. R. 666, $35,000 to $30,000 for a truck-driver who had been seriously burned; Kirk v. Railway Co., (1928) 105 W. Va. 335, 142 S. E. 434, $45,000 to $30,000 for a brakeman who had suffered the loss of one arm and severe fractures in his leg.

In some cases, after the trial court has ordered a reduction, the appellate court may order an additional decrease. See Stroup v. Northeast Oklahoma R. Co., (1927) 122 Kan. 587, 253 Pac. 242, $36,700 to $30,000 to $20,000 for a young woman who had suffered nervous shock and impaired health; Garedpy v. Chicago, M. & St. P. & P. Ry. Co., (1929) 176 Minn. 331, 223 N. W. 605, $33,000 to $28,000 to $23,000 in the case of a railroad crewman, 20 years old, whose leg was broken and permanently shortened; Boyer v. Missouri Pac. Ry. Co., (Mo. 1927) 293 S. W. 386, $35,000 to $20,000 to $15,000 in the case of a boy of twenty who had suffered nervous shock and was left with heart trouble; Lovett v. Kansas City Terminal Ry. Co., (1927) 316 Mo. 1246, 295 S. W. 89, $60,000 to $40,000 to $25,000 for a switchman whose body had been crushed and bruised.

[95]Where the trial court was sustained: McLean v. Amer. Ry. Express Co., (1928) 243 Mich. 113, 219 N. W. 664; Soquian v. Douglas, (Mo. App. 1927) 295 S. W. 828; McCann v. Omaha & Coun. Bluffs St. Ry., (Neb. 1929) 222 N. W. 633; Hellerich v. Central Granaries Co., (1920) 104 Neb. 818, 178 N. W. 919; Dube v. Bonin Spinning Co., (R. I. 1927) 136 Atl. 1; cf. Cartier v. Liberty Laundry, (1927) 49 R. I. 12, 139 Atl. 473, where the verdict had been originally for $1,600, and after the trial the judge had ordered the plaintiff to remit all over $500, the appellate court affirmed a judgment for the plaintiff on condition that he remit all over $1,000. The appellate court may, if the plaintiff appeals, order the original award to be reinstated. Heeter v. Boorum & Pease Co., (Mo. App. 1922) 237 S. W. 902; Fitzgerald v. New York Central R. Co., (1925) 215 App. Div. 1, 212 N. Y. S. 749; Farris v. Norfolk & Western Ry. Co., (1925) 141 Va. 622, 126 S. E. 673.

[96]See notes 77 and 78 above. Shearer v. Pruent, (1926) 166 Minn. 425, 208 N. W. 182; Goodwin v. Dentato, (N.J. Sup. 1929) 144 Atl. 177; Ellis v. North Hudson Auto Bus Co., (1926) 5 N. J. Misc. 1, 135 Atl. 271; Phillips v. London & South Western Railway Co., L. R. (1879) 5 Q. B. Div. 78. Cf. Mercado v. Nelson, (1925) 118 Kan. 302, 235 Pac. 123, where the plaintiff had received a judgment for $1,500. He asked that the damages be increased, but did not ask for a new trial. It was held that the damages could not be increased by direction. Cf. Greenfield v. Unique Theatre Co., (1920) 146 Minn. 17, 177

usually appeals from the trial judge's order giving the plaintiff his option to remit the excess. He may object to the constitutionality of the process. The question was raised recently in Ohio and decided against the defendant-appellant.[97] This power of the courts, it is said, concerns the matter of weighing evidence and drawing inferences therefrom, and is similar to the power which a trial judge has to direct a verdict for one party or the other. In a Minnesota case, the trial judge ordered the plaintiff to remit the excess in a verdict after a motion for a new trial by the defendant upon the grounds of newly discovered evidence. The plaintiff accepted the reduced amount, the defendant appealed, and the supreme court upheld the power of the trial judge.[98]

The experience of juries is limited to a few cases. Judges are accustomed to weighing this particular kind of evidence. They talk about compensation but they realize that assessing damages is a practical matter. The trial judge is in a better position than the appellate court to effect the compromise that is necessary. He has seen the witnesses and heard the evidence at the trial. He has had the experience and the professional training to enable him to deal with the problem presented. Unless the amount of damages is so great, after he has sustained the verdict, as to indicate prejudice, or even corruption, upon his part as well as the jury's, what the trial judge has allowed should stand as the

N. W. 666, where the plaintiff was a married woman and had obtained a verdict for one dollar. The court said that ordinarily a verdict for a nominal amount would be inconsistent with a finding of liability, but that the evidence in the case showed that the injuries were feigned, the negligence trivial and that the plaintiff was a "repeater" in negligence cases. With the Greenfield case compare Gunderson v. Danielson, (1926) 169 Minn. 399, 211 N. W. 471, and Severson v. Danielson, (1926) 169 Minn. 397, 211 N. W. 472. In each case the order of the trial judge denying the plaintiff's motion for a new trial was reversed, the court saying that damages had been inadequate, and that there was enough in each case to distinguish it from the Greenfield case. Cf. Clark v. Spurdis, (Tex. Civ. App. 1924) 258 S. W. 881, where the jury had found all the special issues on liability for the plaintiff, but had found damages of one dollar. The judgment was reversed because the award of damages was inconsistent with the findings.

[97]Alter v. Shearwood, (1926) 114 Ohio St. 560, 151 N. E. 667. See note 72 above. Cf. Chester Park Co. v. Schute, (1929) 120 Ohio St. 273, 166 N. E. 186. In that case the action was brought for wrongful death. The jury had found a verdict for the plaintiff for $20,000, which amount had been reduced by the trial judge to $15,000, and by the court of appeal to $10,000, all with the consent of the plaintiff. No error was alleged to have been made in the instructions. The judgment for $10,000 was affirmed. The opinion purports to justify the cutting down of juries' verdicts by trial judges and appellate courts.

[98]Podgorski v. Kerwin, (1920) 147 Minn. 103, 179 N. W. 679.

final judgment.[99] The exception should be acknowledged for what it is and not be considered the rule. Almost every appellant in a personal injury case raises the question of excessiveness in the higher court. That places an unnecessary burden upon the appellate judges.

V. The Conclusion

The amount of litigation in the field of personal injury is still tremendous. The work of the trial courts and appellate judges in translating the problems in these cases to the juries and in reviewing the results occupies a large portion of the courts' time. Too many cases are reviewed. The problems concerned have not been adequately considered. The courts talk about compensation which it is impossible to calculate. They speak in terms of formulae for measuring damages, but they hesitate to apply these formulae in every case. It is virtually impossible to know whether a large verdict will be reduced by way of a remittitur, or be allowed to stand, or whether a new trial will be granted because the amount is excessive.

It cannot be overemphasized that the problem of assessing damages in personal injury cases is that of evaluating a physical hurt, not absolutely but for the protection of the individual who

[99]In Sun Oil Co. v. Rhodes, (C.C.A. Cir. 1926) 15 F. (2d) 790, the court said that the amount of a verdict could not be questioned in that court. The court cited Lincoln v. Power, (1894) 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224. In the latter case the court had said that in a writ of error the matter of excessiveness could not be raised unless it had first been presented to the trial court. That requirement is not unusual. See Herencia v. Guzman, (1910) 219 U. S. 44, 31 Sup. Ct. 135, 55 L. Ed. 81, where the court said that the excessiveness of the verdict could not be raised on a writ of error. See the opinion in Merrill v. St. Paul City Ry., (1927) 170 Minn. 332, 337, 212 N. W. 533, "It is difficult for an appellate court always to feel contented with a verdict which is seriously close to being excessive. It is excessive when greater than can legally be permitted. But it is not our function to fix verdicts. We are required to pass upon them. Our power in this respect must be exercised sparingly. If we should yield to the almost constant demand of the bar to reduce verdicts or grant new trials, we should soon bring confusion into the practice and eventually reach the state where this court would be trying cases. We recognize that the approval of the verdict by the trial court is discretionary and we will not interfere unless it clearly appears that there was an abuse of discretion." The court held that $2,045 was not too much for an injury to a locomotive engineer's hand. It is submitted that this opinion contains a just criticism of the modern practice in the appellate courts. For the reasons suggested in the text, the exercise of this power by the trial judges is advantageous, but it should end there, unless in the exceptional case, where the trial judge has been guilty of apparent misconduct.

has received the injury. Objections to instructions and findings should not be weighed by the courts as if there are as many interests of the plaintiff in the particular case as there are separate items in the evidence. Rules and theory must be, and in practice often are, cast aside for the purpose of producing a reasonable result. And that result must be, in these cases, a compromise between theoretical compensation on the one hand, and practicability on the other.

A working order of things is involved. There are other factors than the mere breaking of bones or the loss of health to be considered. The law purports to make the defendant bear the risk of the plaintiff's loss. How much can the defendant stand? How much can the plaintiff get along with and not be made to bear too much of the risk himself? Can the courts afford to impose a penalty upon either of the parties? The whole matter requires a keen understanding of social responsibility. No problem is more difficult of scientific adjustment. It is left to the courts to fashion some sort of order out of the crude judgments of inexperienced laymen. A better process has not been devised, and no radical changes are herein suggested. But society can demand that this process be used to its best advantage.

The remedy of a new trial when the plaintiff has already established the defendant's liability is drastic. It prolongs litigation. When a new trial is thought to be necessary, even to show the extent of the hurt, or to produce enough evidence to support a reasonable award, it should extend to the matter of damages only. New trials in personal injury cases, because of mistakes in assessing damages, will seldom be required, when the courts are willing to look at the problem in its larger aspect, as well as to concede that there are limitations even upon approximate calculations.